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Supreme Court of the United States

OCTOBER TERM, 1959

No. 176

FRANK C. MITCHELL,
Petitioner,

v.

TRAWLER RACER, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Supreme Court of the United States

October Term, 1958

No.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Frank C. Mitchell, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit (hereto appended and marked Appendix A) affirming the judgment of the United States District Court for the District of Massachusetts (hereto appended and marked Appendix B).

I.
Opinion Below

The opinion of the Court of Appeals for the First Circuit is reported in 265 F 2d. 426. This opinion is hereto appended and marked Appendix C (R.A. pp. 55-68).

II.
Jurisdiction

The judgment of the United States Court of Appeals for the First Circuit, here sought to be reviewed, was entered on April 7, 1959 (R.A. p. 55).

The jurisdiction of this Court to review by writ of certiorari the judgment complained of is conferred by 28 U.S.C.A. Sections 1254 (1) and 2101 (c).

No motion for rehearing was sought in the Court of Appeals.

III.
Questions Presented

1. In an action by a seaman to recover damages for personal injuries sustained as a result of unseaworthiness due to the temporary presence of a foreign substance, whether notice, actual or constructive, of the unseaworthy condition is an essential element of the seaman's case.
2. In an action by a seaman to recover damages for personal injuries sustained as a result of unseaworthiness due to the temporary presence of a foreign substance, and the presence of the foreign substance arose out of the usual work performed on the vessel, whether notice, actual or constructive, of the unseaworthy condition is an essential element of the seaman's case.

IV.
Reasons Relied Upon for the Allowance of the Writ

There is substantial conflict in the Courts of Appeals, with the First Circuit and the Third Circuit holdings being opposed by the holdings of the Second Circuit and the Ninth Circuit.

The decision of the court below would effect a substantial change in the basic and traditional admiralty and maritime law, as it is in direct conflict with many decisions of this Honorable Court, including *The Osceola*, 189 U.S. 158; *Mahnich* v. *Southern SS Co.*, 321 U.S. 96; *Carlisle Packing Co.* v. *Sandanger*, 259 U.S. 255 and *Petterson* v. *Alaska SS Co.*, 347 U.S. 396.

V.
Statement of the Case

This is a case involving the rights of seamen and maritime workers injured as a result of unseaworthiness, where the unseaworthiness is caused by a so-called "transitory" condition arising out of the usual work of the vessel. The petitioner's Amended Complaint was in three counts, the first count based on negligence under the Jones Act, 46 U.S.C.A., 688 (Appendix D) the second count based on unseaworthiness under the General Admiralty and Maritime Law, and the third count being for maintenance and cure. The case was tried to a jury, which returned a verdict for the respondent on Counts I and II, and a verdict for the petitioner on Count III. (R.A. p. 13).

The petitioner appealed from the jury's verdict on the unseaworthiness count and his appeal was predicated on the trial court's failure to instruct the jury correctly on what the petitioner had to prove in order to prevail in the unseaworthiness count. (R.A. p. 13).

The petitioner's action was commenced by Complaint

in the U. S. District Court on August 16, 1957. An Amended Complaint was filed on September 19, 1958. The evidence showed that the petitioner was a seaman and a fisherman, and was a member of the crew of the Boston fishing trawler Racer, and was employed by the respondent. (R.A. p. 8). On April 1, 1957, the Racer returned to Boston at the end of a ten-day fishing trip to the North Atlantic fishing grounds. (R.A. pp. 8, 15). There was a trip of fish aboard to be unloaded, and the trip included fish spawn, which, during the spawning season, in accordance with agreement between crew and owner, was saved, and provided some added income for the twelve deck hands, in addition to their shares of the balance of the catch. (R.A. p. 54). The spawn is unloaded first. Later the fish is unloaded. After the fish spawn is unloaded, and before the fish that remains is unloaded, the dock is washed down by a crew-member using a hose. Those crew-members who wish to go ashore then do so and the remainder, together with additional workers known as lumpers, unload the balance of the catch. (R.A. pp. 15, 24).

On the morning of April 1, 1957, the petitioner had worked in the hold of the Racer in the unloading of the fish spawn. He then came on deck, went forward and into the forecastle, changed into his shore clothes and came on deck to go ashore. The unloading of the fish spawn had been completed. In accordance with custom, he stepped up on the port rail in order to get onto the ladder attached to the side of the wharf by which to get on shore. (R.A. p. 31). The dock had been washed (R.A. pp. 40-41) and the port rail had slime and fish gurry on it covering about ten to twelve feet of the rail. (R.A. pp. 29, 31). As the petitioner stepped on the rail of the vessel, he slipped in the slime and fish gurry, and to save himself from falling overboard, he thrust his right arm through a rung of the ladder and hung there until able to work his way back

aboard the vessel to safety. (R.A. p. 29). As a result of hanging suspended by his arm, he sustained serious permanent injury to that arm.

The trial judge ruled, as a matter of law, that at the time the petitioner was injured, he was an employee of the respondent and engaged in the course of his employment. (R.A. pp. 10-11). The trial judge denied the respondent's requests for directed verdict on the first two counts. (R.A. p. 2).

In instructing the jury, the trial judge failed to distinguish between negligence and unseaworthiness, and charged that in order to recover on either count, the petitioner had to show that the slime and gurry was on the rail for a period of time long enough for the respondent to have known about it and to have had the opportunity to remove it. (R.A. p. 12).

Counsel for the petitioner made an oral request that the court distinguish between negligence and unseaworthiness, and, in particular, requested that the court instruct the jury that insofar as the unseaworthiness count was concerned, notice was not a necessary element in proving liability. (R.A. p. 13). The trial judge denied the oral request (R.A. p. 13) and the petitioner appealed to the Court of Appeals for the First Circuit (R.A. p. 13). The Court of Appeals held that the district judge had committed no error and affirmed the judgment of the district court. (R.A. p. 69).

The petitioner submits that the court below has erroneously affirmed the judgment of the district court.

VI.
Argument

The doctrine of seaworthiness is based on a warranty implied by law. Breach of this warranty automatically

gives rise to liability for resulting damages, unless the shipowner can establish and prove a valid defense. The warranty is one which does not depend upon negligence. It includes the affording to seamen of a reasonably safe means of boarding and departing from the vessel.

There is a long line of cases which hold that a shipowner has an absolute and non-delegable duty to provide and maintain a seaworthy vessel, and that duty is not based upon any considerations of negligence. *The Osceola* 189 U.S. 158, 173-175; *Seas Shipping Co.* v. *Sieracki,* (1948) 328 U.S. 85; *Petterson* v. *Alaska S.S. Co.,* 205 F.(2d) 478 (9 Cir. 1953), affd, 347 U.S. 396, 74 S. Ct. 601 (1954).

Notice, actual or constructive, is one of the prerequisites to recovery in a negligence action, and to impose it upon cases based upon unseaworthiness would be to remove a basic distinction. With the emergence of the so-called "transitory unseaworthiness" doctrine in the case of *Cookingham* v. *U. S.,* 184 F.(2d) 213 (3 Cir) (1950) in which a cook was injured when he slipped on some jello on a stairway, a majority of that court held that the "transitory" presence of a foreign substance did not render the vessel unseaworthy. Judge Biggs, however, dissenting, pointed out that when one introduces evidence that the unsafe condition existed for an unreasonable period of time, it would be tantamount to constructive notice under the doctrine of negligence, i.e., fault, which is not an element in an unseaworthiness case. Judge Biggs stated:

> "The duty of the owner to maintain a seaworthy ship is an absolute one. It has no connection with negligence. If the ship or her gear is not safe to use, the ship is not seaworthy . . . If the stairway was in a condition dangerous for the use for which it was intended, however 'transitory', it was unseaworthy.

> It remained so while the unsafe condition persisted. The element of time which has intruded itself in this case . . . is irrelevant under the doctrine of the shipowner's absolute liability."

Although the "transitory unseaworthiness" doctrine received some following, the later cases of *Petterson, Poignant, Boudoin, Maloney, Grillea* (citations to follow) and other cases, have discredited that doctrine, so that notice in such cases should no longer be anywhere felt to be a prerequisite to proving liability based on unseaworthiness.

In *Petterson* v. *Alaska S. S. Co.*, 205 F.(2d) 478 (9 Cir. 1953), affd., 347 U.S. 396, 47 S. Ct. 601 (1954), an independent stevedoring contractor brought aboard a defective block which was used in conjunction with one of the vessel's appurtenances. This resulted in injury to a longshoreman. Chief Judge Denman, speaking for the Court of Appeals, stated:

> ". . . Here we are dealing with a species of strict liability regardless of fault. It is not necessary to show, as it is in negligence cases, that the shipowner had complete control of the instrumentality causing the injury, or that the result would not have occurred unless someone were negligent. *It is only necessary to show that the condition upon which the absolute liability is determined—unseaworthiness—exists.* (cases cited) (italics supplied)
>
> ". . . The duty of the shipowner (to provide a seaworthy ship) . . . is a form of absolute duty owing to all within the range of its humanitarian policy . . . and . . . peculiarly and exclusively the obligation of the owner . . . one he cannot delegate . . ." (Cases cited)

The court held that the shipowner was liable, even though the injury was caused by the block brought aboard by the independent contractor, and even though control of that portion of the ship involved in the accident had been relinquished by the shipowner. And the court also stated:

> "The liability of the shipowner to the seaman for injuries resulting from unseaworthiness does not depend upon negligence. It is absolute. See Mahnich v. Southern S. S. Co., 321 U. S. at 100, where the Supreme Court said, '. . . Cases in this and other federal courts have followed the rule of The Osceola (189 U.S. 158) that the exercise of due diligence does not relieve the owner of his obligation to furnish adequate appliances.' "

In *Poignant* v. *U. S.*, 225 F(2d) 595 (2 Cir. 1955), a stewardess slipped on a "transitory foreign substance", i.e., an apple skin, in a passageway of a vessel. The trial judge had ruled that the libellant could not recover under the Jones Act because the respondent had had no notice, actual or constructive, and the trial court also ruled that for lack of notice the respondent could not be held to have breached its warranty of seaworthiness. In reversing the decree of the district court, Circuit Judge Hincks, speaking for the Court of Appeals, stated:

> "Under the general maritime law, an injured seaman, once he proves an injury caused by an unseaworthy condition, may recover without proof of negligence on the part of the vessel's owner. In Seas Shipping Co. v. Sieracki . . . the Supreme Court, in referring to the doctrine of unseaworthiness stated, 'It is essentially a species of liability without fault, analogous to other well-known instances in our law. Derived

from and shaped to meet the hazards which performing the service imposes, the liability is neither limited by conception of negligence nor contractual in character . . . It is a form of absolute duty owing to all within the range of its humanitarian policy.' . . . *Since the inquiry in unseaworthiness cases is not directed to the issue of the owner's fault, it follows that prior notice, actual or constructive, of the unseaworthy condition is not essential to a cause of action based on that doctrine.* (Italics supplied) That such is the law is further apparent from the decision of the Supreme Court in Petterson v. Alaska S. S. Co. In this case, the Court held that the relinquishment of control over the vessel to an independent contractor did not serve to exonerate the owner from his absolute liability . . . Since lack of control does not prevent the accrual of absolute liability for unseaworthiness, there is no reason why that liability should depend upon notice to the owner."

Continuing with the court's opinion, Judge Hincks called attention to the Cookingham and other cases which had held that a transitory foreign substance did not constitute a breach of the warranty of seaworthiness. He then stated, as follows, at pp. 597-8:

"*The Petterson case, later decided, makes it plain that the results reached in this line of cases (Cookingham) cannot be justified by the mere fact that the existence of such a condition was not brought to the knowledge of the owner or that he lacked opportunity to prevent or correct the condition* . . . And so, we hold, although the owner is *absolutely liable* for failure to provide a vessel which measures up to

> the standard of the law, that standard is not perfection but reasonable fitness." (Italics supplied)

The Court of Appeals for the First Circuit enunciated the test for unseaworthiness in the case of *Doucette* v. *Vincent*, 194 F(2d) 834 (1 Cir. 1952), when it stated:

> ". . . Nor is perfection required of shipowners by the maritime law of unseaworthiness, for generally stated it is the shipowner's duty under the law to provide a vessel sufficient, that is reasonably adequate . . . for the trade or service in which the vessel is employed. (Cases cited) . . . It is no matter that the shipowner may have used all care and diligence to supply a vessel and equipment conforming to this standard of seaworthiness. The liability does not depend on negligence. As stated in Seas Shipping Co. v. Sieracki . . . , 'it is a form of absolute duty', that is, the shipowner must at his peril furnish a seaworthy ship and seaworthy equipment . . ."

The proper question to be considered by court or jury in these cases is not whether there was notice, but whether, in fact, there has been created an unseaworthy condition by the presence of a transitory foreign substance. "Transitory" unseaworthiness is, in effect, a type of "temporary" unseaworthiness. Is the seaman less likely to injury merely because the unseaworthy condition may be a temporary one? Is not unseaworthiness, permanent or temporary, non-transitory or transitory, just as much an unseaworthy condition, irrespective of its duration or extent? The basic question viewed in its proper light, should not entail any consideration of whether the condition complained of is transitory or non-transitory, but should be

a consideration of whether the condition complained of constitutes an unseaworthy condition.

Of course, the furnishing of reasonably adequate appliances, gear and appurtenances also includes the maintaining of them in that condition, as the mere furnishing alone does not discharge a continuing duty. The warranty of seaworthiness is thus absolute, non-delegable and continuing. *Petterson* v. *Alaska S. S. Co., Mahnich* v. *Southern S. S. Co.*

In *Pacific Far East Line* v. *Williams*, 234 F(2d) 378 (9 Cir. 1956), a longshoreman was injured when he fell into the hold. Evidence showed that the injuries occurred as a result of moisture and frost on the hatch coaming and insufficient light. In its decision upholding a verdict for the injured longshoreman, the Court of Appeals for the Ninth Circuit stated that it does not follow the Cookingham doctrine of "transitory" unseaworthiness.

In *Grillea* v. *U. S. and National Shipping Authority*, 232 F(2d) 919 (2 Cir. 1956), a longshoreman fell into the hold when the vessel became unseaworthy due to his own negligence or the negligence of his companion, or both, in selecting the wrong hatch-cover to place over the pad-eye. The court held, per Circuit Judge Learned Hand:

> "... It may appear strange that a longshoreman, who has the status of a seaman, should be allowed to recover because of unfitness of the ship arising from his own conduct, in whole or in part. However, there is in this nothing inconsistent with the nature of the liability because it is imposed regardless of fault; *to the prescribed extent, the owner is an insurer, though he may have no means of learning of or correct-*

> *ing the defect. The Supreme Court recently re-affirmed this doctrine in Alaska Shipping Co.* v. *Petterson,* 347 U.S. 396; *and we have since followed suit in Poignant* v. *United States,* 225 F(2d) 595."

In *Rodriguez* v. *The Texas Co.,* 254 F(2d) 295 (2 Cir. 1958), where there was oil leaking from a turbine onto a platform where a seaman was working, the court held that that raised an inference of unseaworthiness, even though it was the seaman's job to keep the platform clean.

In *Sprague* v. *The Texas Co.,* 250 F(2d) 123, (2 Cir., 1957) where a steam connection suddenly let steam escape even though the gauge registered zero, there was a directed verdict for the injured seaman. The court held:

> "On a suit based on unseaworthiness, neither negligence nor notice of the defective condition need be considered . . . negligence or notice of defective condition is not a necessary factor to sustain the trial court's decision."

In the case of *Boudoin* v. *Lykes Brothers S. S. Co.,* 348 U.S. 336, where there was an assault by one seaman upon another, and where it appeared that the shipowner had no notice, actual or constructive, of the disposition and propensities of the assaulting seaman, this Honorable Court held that the shipowner was liable because the ship was unseaworthy "irrespective of any fault".

In *Johnson Line* v. *Maloney,* 243 F.(2d) 293, (9 Cir., 1957) a longshoreman was injured when he slipped on a deck made slippery by the presence of wheat dust and wheat kernels. The court specifically rejected the transi-

tory unseaworthiness doctrine that was advanced by the shipowner.

In the case of *Jenkins* v. *Roderick*, 156 F. Supp. 299, 300, 301 (D. Mass., November 5, 1957), Judge Wyzanski of the United States District Court for the District of Massachusetts, also the trial judge in the instant case, stated,

> "When, as at bar, a seaman's injury is alleged to be due to a defective apparatus, to succeed on either the Jones Act or the unseaworthiness count plaintiff must prove (1) the defect (2) its causal connection with plaintiff's injury, and (3) the extent of plaintiff's damages. In the Jones Act count he must go further and show defendant knew or should have known of the defect."

Following the trial of this case in the district court, judgment was entered on October 2, 1958. The petitioner's Notice of Appeal was filed on October 17, 1958. On October 31, 1958, the trial judge filed a Memorandum to which the petitioner wishes to make brief reference. This Memorandum had no part in the trial of the case and petitioner refers to it to show two specific inconsistencies of the trial judge.

The Memorandum suggests activities of a co-adventurer of the plaintiff. However, the trial judge ruled as a matter of law that the plaintiff was an employee of the defendant and had been injured in the course of his employment. In the Memorandum, the trial court stated that there should have been a directed verdict for the defendant on the unseaworthiness count. Nevertheless, the trial court denied the defendant's request for directed verdict.

If one were to accept the proposition that notice is a necessary element in the so-called "transitory" unseaworthiness cases, then there would necessarily arise a new problem. In each case there would be a preliminary question of fact to be determined by the court or jury, whether the condition complained of was transitory or not transitory. A shipowner-defendant could then argue that every condition not directly connected with the physical structure of the vessel could be considered to be transitory To do this would be to run contra to the many prior decisions of this Honorable Court in unseaworthiness cases.

It is worthy of note in the instant case that the injuries sustained by the petitioner did not occur while the unloading was going on, but after the fish spawn had been unloaded and the petitioner was on his way ashore.

This Honorable Court has said many times that the shipowner has an "absolute and non-delegable" duty to provide and maintain a seaworthy ship. It is pertinent to define what the word "absolute" means. By definition, in Webster's New International Unabridged Dictionary, 1955 Edition, "absolute" is defined as . . . "complete, free from limit, restriction or qualification . . . not relative . . .". If one relies upon this definition when this Honorable Court uses the word "absolute" in connection with the warranty of seaworthiness, there can then be no qualification, limitation or restriction, and the transitory unseaworthiness doctrine should have no acceptance or following in the courts. The shipowner still has the protection of the test of what constitutes seaworthiness, i.e., reasonably adequate and proper appliances, gear and appurtenances. To stress the "transitory" nature of a dangerous condition is to invoke concepts of negligence, which this Honorable Court rejected as unsound doctrine in the Sieracki, Petterson and Boudoin cases.

Nevertheless, in the opinion of the Court, Chief Judge Magruder, speaking for the Court of Appeals for the First Circuit says:

"Cases can be found which *seem to say* that the liability thus imposed is a species of liability without fault, not dependent upon proof of negligence or other fault," and his opinion goes on to cite those cases. The petitioner respectfully submits that those cases don't merely *seem to say,* they, in fact, say it without limitation and without restrictive suggestions (Italics supplied). These are among the foundations of the admiralty law, much of it antedating the Jones Act. These things that Judge Magruder says the cases *seem to say* are fundamental and have been accepted as basic concepts of the admiralty law. In striking at these foundations of admiralty law, Judge Magruder concluded that the cases, many by decisions of this Honorable Court did not really mean what they seemed to say.

The petitioner submits, that there are two separate and distinct avenues by which a seaman may seek indemnity for injuries sustained while employed as the member of the crew of a vessel. One is based upon negligence and there are certain elements to be proved in a negligence action; the other is based upon unseaworthiness and proof of liability differs from that in the negligence action for the same injuries. If one were to follow the reasoning and the conclusion of Judge Magruder, the result would be to obliterate the distinction between these two types of actions in many instances. Long before the enactment of the Jones Act, a seaman had the protection of the warranty of seaworthiness. The enactment of the Jones Act in 1920 merely added to the existing maritime law the shipowner's responsibility and liability for negligence and it created an additional right of recovery and did not in any way tend to limit or restrict the seaman's rights based upon unseaworthiness.

Unseaworthiness is not based upon the exercise of due care. When one speaks of unseaworthiness the exercise of due care, notice, scienter are not to be considered, since they do not enter within the concept of unseaworthiness but apply strictly to claims based upon negligence.

Judge Magruder, in his opinion, states that to hold shipowners liable for unseaworthiness created by a transitory condition would be a hard doctrine. The petitioner's reply to that is that seamen, by the very nature of their employment, recognized by decades of learned decisions, live and work under onerous and difficult conditions over most of which they have little or no control. There is demanded of the seamen rigid requirements of discipline within the service of the vessel, and for these and other reasons the seaman's employer has had imposed upon him certain obligations which, if imposed upon a shore employer, might seem stringent and harsh, but when imposed upon the shipowner are no more harsh and no more stringent than the working conditions and the obligations imposed upon the seaman himself. The hard doctrine, if any, imposed upon the shipowner can be said to correspond to the rigorous demands made upon the seamen in the course of their employment on the shipowner's behalf.

In the opinion of the court below, reference is made to the hypothetical case of a ship which, initially seaworthy in all respects, is buffeted in a huge storm, so that part of its rail is washed away and seconds later a seaman is washed overboard through the breach in the rail. Upon being asked, petitioner's counsel stated that that would present a case of indemnity based upon unseaworthiness. The court did not pursue the matter further, but in its opinion it stated that it did not agree with counsel. The petitioner's counsel reiterates his position in the hypothetical case and suggests that a defense of the shipowner, if any exists in the hypothetical case, could be based, not

upon the fact that the seaman was washed overboard seconds after the breach occurred and before the shipowner had an opportunity to replace the rail, but upon the theory that the storm was a most extraordinary one. Thus, in the hypothetical case, the shipowner could argue that the rail had been reasonably adequate for the purpose for which it had been intended, and that the seaman had been lost only because of a very extraordinary peril of the sea. And certainly, in such a case, it would be argued by the plaintiff that the rail was not reasonably adequate. Thus the case would turn upon the test of seaworthiness or unseaworthiness of the rail, and not upon notice. That, indeed is the proper and appropriate test in the petitioner's case.

The long line of cases, including Sandanger, The Osceola, Sieracki, Petterson, Poignant, Mahnich, Boudoin and others are those relied upon by the petitioner to sustain his position that even where the unseaworthy condition may be of a temporary or transitory nature, notice to the shipowner is not required in establishing liability.

VII.
Conclusion

Wherefore, the petitioner respectfully submits that the ruling of the court below is contrary to the standards of law as laid down by clear pronouncements in the decisions of this Honorable Court and that certiorari should be granted.

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Appendix A

JUDGMENT

April 7, 1959

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, it is now here ordered adjudged and decreed as follows: The judgment of the District Court is affirmed.

(s) ROGER A. STINCHFIELD
Clerk.

Appendix B

WYZANSKI, J. After trial and in accordance with the verdict of the jury, it is ORDERED judgment for the defendant on Counts I and II of the complaint and judgment for the plaintiff on Count III of the complaint in the amount of $2500, minus $282.00 heretofore paid.

By the Court

(s) C. WYZANSKI
U. S. D. J.

(s) MIRIAM M. WYNN
Deputy Clerk.

Judgment entered October 2, 1958.

Appendix C

United States Court of Appeals
For the First Circuit

No. 5429.

FRANK C. MITCHELL,
PLAINTIFF, APPELLANT,
v.
TRAWLER RACER, INC.,
DEFENDANT, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS.
[167 F. Supp. 434]

Before MAGRUDER, *Chief Judge*, and WOODBURY and HARTIGAN, *Circuit Judges*.

Morris D. Katz for appellant.
James A. Whipple for appellee.

OPINION OF THE COURT.
April 7, 1959.

MAGRUDER, *Chief Judge*. The amended complaint in this case, filed on the law docket of the United States District Court, sought damages for personal injuries sustained by a member of the crew of the fishing vessel RACER when he lost his footing while leaving the vessel due to the presence, as claimed, of some slimy substance. Count I of the amended complaint was based upon the Jones Act (41 Stat. 1007) and charged that the accident was caused by various acts of negligence on the part of the shipowner or members of the crew. Count II was "brought under the General Maritime Law for Unseaworthiness". Count III claimed $5,000

damages for the expenses of maintenance and cure. The trial judge left all three counts to the jury, which returned verdicts for the defendant on Counts I and II and for the plaintiff in the sum of $2,500 on Count III. On October 2, 1958, judgment was entered pursuant to the verdict.

Plaintiff duly took an appeal from "that portion of the Judgment entered on October 2, 1958, relating to Count II of the Plaintiff's Amended Complaint, the said Count II being based upon the unseaworthiness of the defendant's vessel." In charging the jury, over plaintiff's objection, the trial judge had treated Count II based on unseaworthiness (confessedly relating to the same accident as was covered by Count I) as requiring proof of the presence of the unseaworthy condition for a sufficient length of time, from which the inference might be drawn that defendant, or his servants, in the exercise of due care, ought to have discovered the presence of the slimy substance and removed it. In other words, as the district court put the issue of unseaworthiness to the jury, he asked them to find whether as a matter of fact there was a slimy substance on the rail of the ship, and if so "was it there for a reasonably long period of time so that a shipowner ought to have seen that it was removed?". Appellant contends that this was a misdirection of law; that damages caused by unseaworthiness are recoverable without fault, and independent of negligence; and that at the moment the slimy substance appeared on the rail, the vessel, or its equipment, became unseaworthy, with the result that there remained to be considered by the jury under Count II, assuming that the jury believed the slime was there, only the question whether this unseaworthy condition was a proximate cause of the plaintiff's injury.

At the outset, we think we ought of our own motion to take note of a possible lack of jurisdiction in the district court sitting as a court of law with a jury, not as a court

of admiralty. See *Louisville & Nashville R.R. Co.* v. *Mottley*, 211 U.S. 149, 152 (1908). Though there was no diversity of citizenship to give jurisdiction to the district court under 28 U.S.C. § 1332, the complaint was properly filed under what had been the interpretation by this court in *Doucette* v. *Vincent*, 194 F.2d 834, 839 (1952), of the jurisdictional provisions of 28 U.S.C. § 1331. But our holding in that case has recently been disapproved by the Supreme Court in *Romero* v. *International Terminal Operating Co. et al.*, decided February 24, 1959. Therefore, no longer can it be asserted that there was an independent basis of jurisdiction under 28 U.S.C. § 1331 which would authorize the district court with jury to entertain a complaint based on unseaworthiness as provided in the general maritime law. The same might be said for Count III, for maintenance and cure, though that count is not now before us.

However, as counsel for appellant has pointed out, the district court, despite the lack of diversity of citizenship, had jurisdiction of Count I, a substantial cause of action based upon the Jones Act, so that, pursuant to the actual holding in the *Romero* case, that court thereby acquired a "pendent" jurisdiction of the related claims under the general maritime law growing out of the same acts.

The Supreme Court has applied the doctrine of "pendent" jurisdiction to a case where the pendent or ancillary cause of action was the creation of state law. *Hurn* v. *Oursler*, 289 U.S. 238 (1933). The present is indeed an a fortiori case for the application of the "pendent" doctrine, for here, although the same considerations favor a consolidated action, there is no problem at all of federal-state relations, and the substantive law to be applied to Count II is federal law, that is, the general maritime law as understood and applied in the United States and as formulated, ultimately, by the Supreme Court of the United States. Compare *Massachusetts Universalist Convention*

v. *Hildreth & Rogers Co.*, 183 F.2d 497 (C.A. 1st, 1950), where the pendent claim, which the federal court had "jurisdiction" to entertain, was a state-created claim; we held there that the district court did not commit an abuse of discretion in dismissing the pendent claim without prejudice, it having dismissed the "substantial" federal claim as a matter of law, upon a preliminary motion to dismiss. In a case like the present one, even if the district court had been able to dispose of the federal claim under the Jones Act without trying any issues to the jury, dismissal of the "pendent" claim would hardly have been justified. In view of the fact that the "pendent" claim here, under Count II, is a federal maritime claim, which the district court certainly had jurisdiction to entertain and determine as a court of admiralty, the most that the district court could have done after dismissing the Jones Act count would have been to transfer the remainder of the case to the court's admiralty docket, there to be determined by the admiralty judge sitting without a jury. See *Jordine* v. *Walling*, 185 F.2d 662 (C.A. 3d, 1950).

Where the "pendent" claim is cognizable in a court of admiralty, under the general maritime law, it may well be that the parties do not have a constitutional right to a jury trial of the issues under Count II on the law side of the docket merely because the pendent claim is joined with a claim under the Jones Act. See *Romero* v. *International Terminal Operating Co.*, supra; *Pope & Talbot, Inc.* v. *Hawn*, 346 U.S. 406, 415 note 1 (1953) (concurring opinion). But we do not have that question to decide in this case. The district court has not undertaken to deprive the seaman of a jury trial on the issues involved in Count II. On the contrary, the court in fact submitted to the jury the whole case, that is, the issues involved in all three counts, and entered judgment on all counts in accordance with the jury verdict, including the two counts on which

it had, on the law side, only a "pendent" jurisdiction. See *Strachman* v. *Palmer*, 177 F.2d 427, 431 (C.A. 1st, 1949). We could hardly say that this action constituted an abuse of discretion, considering the broad discretion confided to a district court in the order of trial and determination of claims over which it had an undoubted jurisdiction either direct or "pendent", even if there had been an objection made to the trial by jury (which there was not).

The very policies and advantages which dictate the consolidation of the two types of claims in one trial would seem also to dictate that separate functions of fact-finding not be allocated to the jury and to the judge. To decide the negligence claim, the jury would have to find all the facts necessary to decision on the other counts (and perhaps more). It would indeed be a most unseemly administration of justice if the facts found by the jury under Count I—the Jones Act claim—should in any respect be inconsistent with findings of fact made by the judge, on the admiralty side, in consideration of Count II. Simple economy of effort and efficient administration of justice prove the propriety of what the district court did here: submitting the whole case to the jury, and entering judgment on all counts in accordance with the jury's verdict.

For the foregoing reasons we must reach the merits of this appeal, a result, as it turns out, coinciding on the facts of this case with the result we would have reached had the district court had an independent basis of jurisdiction over Count II under 28 U.S.C. § 1331, which we had erroneously supposed to be so in *Doucette* v. *Vincent*, supra, 194 F.2d at 839.

Due to the peculiar nature of the seaman's calling and his generally helpless condition, he has sometimes been described as "a ward of the admiralty". *Mahnich* v. *Southern S.S. Co.*, 321 U.S. 96, 103 (1944). As a result, certain rules of law have grown up in his favor as part of the

"general maritime law". Thus it is unquestionably true that, when a seaman suffers injury in the service of his ship, the ship or the shipowner owes him an obligation of "maintenance and cure", whether or not his injury may have been produced by anybody's fault, short of gross or willful misconduct on the part of the seaman himself. See *The Osceola*, 189 U.S. 158, 175 (1903). This may be said to be a kind of judicially created Workmen's Compensation Act, with a limitation in the number of items recoverable.

When it comes to an unlimited right of indemnity, over and above "maintenance and cure", for injuries caused by breach of the shipowner's obligation to supply a seaworthy vessel, an obligation sometimes said to be based upon an implied warranty of seaworthiness (see *Mahnich* v. *Southern S.S. Co.*, supra, 321 U.S. at 101), cases can be found which seem to say that the liability thus imposed is a species of liability without fault, not dependent upon proof of negligence or other fault. See *Mahnich* v. *Southern S.S. Co.*, supra, 321 U.S. at 103; *Seas Shipping Co., Inc.* v. *Sieracki*, 328 U.S. 85, 94-95 (1946); *The H. A. Scandrett*, 87 F.2d 708, 710 (C.A. 2d, 1937); *Kulukundis* v. *Strand*, 202 F.2d 708, 710 (C.A. 9th, 1953). See also Woodbury, J., in *Doucette* v. *Vincent*, supra, 194 F.2d 834, 838.

Just how this form of statement got in the books we are not quite sure. So far as we can find, one of the first instances in which a court referred to the shipowner's obligation in respect of seaworthiness as being "absolute" or as a kind of liability without fault is the opinion by Augustus N. Hand, J., in *The H. A. Scandrett*, supra, 87 F.2d at 710.* Judge Hand stated that he thought this

* In the earlier case of *Sabine Towing Co., Inc.* v. *Brennan*, 72 F.2d 490 (C.A. 5th, 1934), it was stated that the duty of the shipowner "as to injuries, for which the general maritime law provides recovery, is absolute. Its breach without regard to negligence makes the owner liable for such losses." Notwithstanding this, the court goes on to say (at p. 494): "We think it quite clear that when an owner buys an old

conclusion followed from what the Supreme Court had said in *The Osceola*, 189 U.S. 158 (1903). The Court (at p. 175) did make the unqualified statement, by way of dictum: "That the vessel and her owner are, both by English and American law, liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship. *Scarff* v. *Metcalf*, 107 N.Y. 211." We say the statement is a dictum, because it was nowhere claimed in *The Osceola* that an unseaworthy condition of the vessel had existed or come into being, and it may be this is the reason why the Supreme Court found it unnecessary there to discuss specifically any possible qualifications as to the basis of the shipowner's liability for unseaworthiness. The New York case referred to in the quoted language was simply one in which the shipowners were held liable for the proven negligence of the mate in failing to supply a seaman with necessary medical attendance and care. Since the shipowner has a nondelegable duty in that respect, it followed that the member of the crew to whom he had delegated the performance of the duty "stands as the agent and representative of the owners and his negligence is theirs." (107 N.Y. at 216) In other words, although, as recognized in *The Osceola*, 189 U.S. at 175, all the members of the crew are fellow servants and hence, under the general maritime law, prior to passage of the Jones Act, seamen could not "recover for injuries sustained through the negligence of another member of the crew beyond the expense of their maintenance and cure", nevertheless there may be recovery of

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tug, licensed coastwise, and equips it for ocean going, it is negligence to send it out without knowing something of its stability, and especially to send it out without such tests, when as in this case its history and performance in regard to crankiness and tenderness is a matter of official record." See also the statement by McReynolds, J., in *Carlisle Packing Co.* v. *Sandanger*, 259 U.S. 255, 259 (1922).

an indemnity against the shipowner for injuries in consequence of unseaworthiness, even if that unseaworthiness may have been brought about by negligence of one of the members of the crew.

In none of the subsequent Supreme Court cases cited by Judge Hand in *The H. A. Scandrett* is there any considered discussion of the basis of liability for injuries resulting from unseaworthiness.

As appears above, in *The Osceola* the Supreme Court said that, both by English and American law, the owner is liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship. By the general maritime law as applied in England, apart from statute, it was originally held that, independent of an express contract or personal negligence by the shipowners, a seaman had no right to indemnity for injuries caused by unseaworthiness. *Couch* v. *Steel,* 3 El. & Bl. 402 (Q.B. 1854). However, by the Merchant Shipping Act of 1876, 39 & 40 Vict. c. 80, § 5, it was provided as follows:

> "[T]he owner of the ship, and the master, and every agent charged with the loading of the ship, or the preparing thereof for sea, or the sending thereof to sea, shall use all reasonable means to insure the seaworthiness of the ship for the voyage at the time when the voyage commences, and to keep her in a seaworthy condition for the voyage during the same".

This statutory liability, the only basis of the indemnity by the law of England, is thus based upon a lack of due care. And it appears that the dictum in *The Osceola* only states the existence of a similar liability in American law.

It is certainly true that in many of the lower court cases, some of which are cited by the Supreme Court in *The Osceola,* the shipowner's obligation, in respect of seaworthi-

ness, is based upon negligence. Thus, in *The Waco*, 3 F.2d 476, 478 (E.D.Pa. 1925), it is stated: "A vessel must be in all respects seaworthy, which is equivalent of the common-law duty of providing a servant or employee with a safe place to work." If that is so, then the duty of a shipowner is only a duty of care. See Restatement (Second), Agency §§ 492, 493 (1958). In our case of *Christopher* v. *Grueby*, 40 F.2d 8 (C.A. 1st, 1930), liability of a shipowner for injuries resulting from a dangerous condition of unseaworthiness in t engine room was said to be based upon the negligence the owners in failing to provide and equip a seaworthy ssel. This court said (at p. 12):

> "The duty of ship owners to their seamen to see that th r ship is seaworthy and her equipment in safe condition for use when she starts on a voyage is a personal one, *responsibility for which they cannot escape by delegating its performance to another.* In this respect it is like the common-law duty of a master to provide his servant a suitable place in which to work. And a seaman injured through failure to perform this duty is entitled to compensation."

In *Storgard* v. *France & Canada S.S. Corp.*, 263 Fed. 545, 547 (C.A. 2d, 1920), an injury was caused to a seaman by a certain bolt, which had become worn and defective, and it was held that "the shipowners knew or ought to have known the fact". And at p. 548: "Employers of seamen may not be insurers, but a much higher degree of care must be required of them than is required of shore servants." In *Gerrity* v. *The Bark Kate Cann*, 2 Fed. 241 (E.D.N.Y. 1880), Benedict, D.J., held the ship liable for personal injuries caused by the insufficient and careless manner in which the ship's crew had stowed dunnage in the between-decks, thus creating an unseaworthy condition sub-

jecting the members of the crew to an unsafe place to work. See the discussions in *The Noddleburn,* 28 Fed. 855 (D.Ore. 1886); by Mr. Justice Gray in *The A. Heaton,* 43 Fed. 592, 593 (C.C.D.Mass. 1890); and by Addison Brown, D.J., in *The Frank and Willie,* 45 Fed. 494, 496 (S.D.N.Y. 1891). See also *Wm. Johnson & Co., Ltd.* v. *Johansen,* 86 Fed. 886 (C.A. 5th, 1898). See generally Tetreault, "Seaman, Seaworthiness, and the Rights of Harbor Workers," 39 Cornell L. Q. 381, 386-403 (1954). In *International Mercantile Marine Co.* v. *Fleming,* 151 Fed. 203, 204 (C.A. 2d, 1907), we find: "It is the duty of the master not only to provide suitable machinery, means and appliances to do the required work, but to use due care to keep them in repair." In *Wholey* v. *British & Foreign S.S. Co.,* 158 Fed. 379, 380 (E.D.N.Y. 1908), the court said:

> "The owner of a vessel must furnish a stevedore employed upon his vessel a safe place to work, in so far as the construction of the vessel and its various parts is concerned, and the inspection and care of these parts is bound to have been such that no hidden defect (which was or should have been known to the officers of the vessel) is allowed to exist and to continue without warning to the stevedores. This, of course, does not include a latent defect that a reasonable inspection by the shipowner or his agents would not show."

The shipowner's duty to furnish and maintain a seaworthy vessel, including equipment and appurtenances, is commonly spoken of as a "nondelegable" duty. See *Globe S.S. Co.* v. *Moss,* 245 Fed. 54, 55 (C.A. 6th, 1917). This surely does not mean that the shipowner may not properly delegate the performance of such a duty to others; it only means that the shipowner sheds no obligations by such delegation, and that, if the duty is merely one of care,

whether he delegates the duty to a servant or to an independent contractor, he must at his peril see that care is used by the person to whom he has delegated the performance of his job. See 2 Restatement (Second) Agency, p. 435, Introductory Note (1958).

We are not under the illusion that an inconvenient controlling precedent can be brushed off merely by an historical demonstration that the precedent was based upon a misunderstanding of earlier decisions. Unfortunately, there may be something in the old saying, "Communis error facit jus." All we say is that, when an appellant urges upon us a proposition of law which we regard as startlingly opposed to principle, we are justified in pointing out that the Supreme Court decisions which seem to have adopted quite casually the rule that a shipowner's obligation to the seaman to furnish a seaworthy ship is "absolute" and in no degree dependent upon negligence, are all in cases where the unseaworthy condition of the vessel in fact existed at the outset of the voyage; none of them related to a temporary condition of unseaworthiness which had arisen without negligence during the progress of the voyage on a vessel unquestionably seaworthy when it left port.

It may be that in the present state of the law, as declared by controlling authority, a distinction must be made between (1) initial unseaworthiness, existing at the outset of the voyage, where perhaps we have to say that the obligation of the shipowner to furnish a seaworthy vessel is "absolute", and (2) an unseaworthy condition which arises only during the progress of the voyage, in which latter case we take it to be the law that the shipowner's obligation is merely to see that reasonable care is used under the circumstances (which may of course require a high degree of diligence) by him (through the agency of the captain, mate, or other members of the crew to whom he has delegated the obligations of management) incident

to the correction of the newly arisen defect. This distinction is indeed suggested in an opinion by Harlan, C.J., in *Dixon* v. *United States*, 219 F.2d 10 (C.A. 2d, 1955). In the present case, there is no claim that the ship's equipment was in any respect defective at the outset of the voyage. Therefore we do not have to decide now what the liabilities of the shipowner might be in respect of an initial condition of unseaworthiness.

According to the testimony submitted by appellant, he and other deck hands had been engaged in unloading spawn removed from the fish catch, and during the course of the operation some spawn and slime accumulated on the ship's rail. Apparently this slippery substance could not have been there very long before appellant came on deck to go ashore. Acting properly under the unquestioned custom, appellant made his way to the port side of the ship, which abutted the pier, and stepped on to the ship's rail in order to reach a ladder which was part of the pier. He grasped the ladder and was reaching for it with one foot to climb it when his other foot slipped off the rail and he fell, causing the injuries complained of.

Granting that the presence of the slippery substance at that place created a transitory condition of unseaworthiness, it seems a hard doctrine to say that the shipowner, however great his duty of care, should be liable for injuries occasioned thereby even before he, through persons acting on his behalf, had a reasonable opportunity to discover the defect and remove it. At the oral argument we asked appellant's counsel what the answer would be if a vessel, in all respects initially seaworthy, should be so buffeted in a huge storm that part of its rail, not due to any inherent defect, was washed away (a ship without a rail would certainly be unseaworthy), and if, seconds later, before anyone had had an opportunity to replace the rail, a seaman were washed overboard through this breach in

the rail. Appellant's counsel, recognizing the logic of his position, was obliged to say the shipowner would be liable to the seaman in such a case for an indemnity, over and above the maintenance and cure to which he would be entitled in any event by the general maritime law. Unless and until the Supreme Court tells us that this is indeed the law, we shall continue to believe that it is not so. We associate ourselves with the majority opinion in *Cookingham* v. *United States*, 184 F.2d 213 (C.A. 3d, 1950), cert. denied 340 U.S. 935 (1951). See also *Brabazon* v. *Belships Co., Ltd.*, 202 F.2d 904, 906 (C.A. 3d, 1953); *Burton* v. *Greig*, 265 Fed. 418 (S.D.Ala. 1920), aff'd 271 Fed. 271 (C.A. 5th, 1921); *Adamowski* v. *Gulf Oil Corp.*, 93 F. Supp. 115 (E.D.Pa. 1950), aff'd 197 F.2d 523 (C.A. 3d, 1952); *International Mercantile Marine Co.* v. *Fleming*, supra, 151 Fed. 203, 204 (C.A. 2d, 1907).

It follows that the district judge committed no error, as alleged, in respect to his charge to the jury on Count II.

A judgment will be entered affirming the judgment of the District Court.

WOODBURY, *Circuit Judge*, (concurring). Since we do not have to decide the question in this case, I would refrain from expressing so strongly the view that efficient administration of justice requires submission to a jury of a claim for unseaworthiness under the general maritime law whenever jurisdiction over that claim on the law side rests upon the joinder with and pendency of that claim with a claim for negligence under the Jones Act. Perhaps in most situations when Jones Act and unseaworthiness claims are joined it would be better to have a jury pass upon both claims at once. But I would leave the district judges free in their discretion to decide the unseaworthiness claim

themselves on the basis of the testimony submitted at a trial by jury of the Jones Act claim. I see no reason why a district judge cannot preside over a jury trial at law and sit in admiralty at the same time and I would leave the way open for a judge to do so if in the exercise of his sound discretion that should seem the appropriate procedure in any particular case. At least, I would not in this case indicate that he ought not do so if he saw fit.

Aside from this relatively minor matter, I heartily concur in Chief Judge Magruder's excellent and interesting analysis of the law of unseaworthiness. I say this even though in *Doucette* v. *Vincent*, 194 F.2d 834, 838 (C.A. 1, 1952), I did indicate, I am afraid too casually and with too implicit reliance on authority, that liability for unseaworthiness does not depend upon a shipowner's negligence and that the owner's duty to provide a seaworthy ship is a form of absolute duty.

Appendix D

MERCHANT MARINE ACT OF 1920 (JONES ACT) 46 U.S.C.A.

Section 688 provides as follows: Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

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Supreme Court of the United States

OCTOBER TERM, 1959

No. 176

FRANK C. MITCHELL,
PETITIONER,

v.

TRAWLER RACER, INC.,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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I.
Opinions Below

The opinion of the Court of Appeals for the First Circuit is reported in 265 F.2d 426.

II.
Counter Statement of Questions Involved

In an action by a seaman to recover damages for personal injuries sustained due to the temporary presence of a foreign substance, whether notice, actual or constructive, of the presence of this foreign substance is an essential of the seaman's case.

III.
Argument

A. Prior to the enactment of the Jones Act a seaman had remedies only for maintenance and cure and the right of indemnity for unseaworthiness.

In *Cortes* v. *Baltimore Insular Line*, 287 U.S. 367, Mr. Justice Cardozo, writing the Opinion of the Court, said:

> "By the general maritime law, a seaman is without a remedy against the ship or her owners for injuries to his person, suffered in line of service, with two exceptions only."

The Opinion goes on to discuss one of the exceptions, maintenance and cure. It then continues:

> "A remedy is his if the injury has been suffered as a consequence of the unseaworthiness of the ship or a defect in her equipment."

This was merely a rephrasing of the language of the *Osceola* Decision that "the vessel and her owners are, . . . liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship, or a failure

to supply and keep in order the proper appliances appurtenant to the ship."

The term "unseaworthiness" was developed in the various cases until the case of *Seas Shipping Company* v. *Sieracki*, 328 U.S. 85, which involved a shackle within which was a flaw or defect which caused it to break under normal use.

It is for this unseaworthiness which in reality means a ship or an appliance so defective as to be unfit for its intended use that courts have actually applied the rule of absolute liability flowing from unseaworthiness. To other conditions involving merely improper use of proper appliances or acts of omission or commission by a fellow-employee resulting in a mere temporary unsafe condition the Courts have applied the Jones Act test of negligence.

B. The safe place to work doctrine had its origin in the common law, not the maritime.

An examination of the early cases shows that the rule originated as a common law rather than a maritime law doctrine and from its very beginning was stated in terms applicable to negligence. In *Hough* v. *Texas and Pacific R. R. Co.*, 100 U.S. 213-226, 25 L.Ed. 612, the Supreme Court said:

> "One and, perhaps the most important of those exceptions arises from the obligation of the master, whether a natural person or a corporate body, not to expose the servant, when conducting the master's business, to perils or hazards against which he may be guarded by proper diligence upon the part of the master. To that end the master is bound to observe all the care which prudence and the exigencies of the situation require, in providing the servant with machinery or

other instrumentalities adequately safe for use by the latter."

Guerrini v. *United States*, 167 F.2d 352, was a case where a shore worker alleged that he had fallen upon a patch of grease. The Court said:

> "In the case at bar the findings are not sufficient finally to dispose of the case; for, although the judge found the respondent negligent, that is not a finding of fact. True, he found that the libellant had slipped upon a patch of grease, but he did not find how long it had been on the deck; and the cause must go back for a specific finding on that issue, because the respondent's negligence depends upon how long the grease had been on the deck. Unless the libellant satisfies the judge that a patch of the size described had been left in the place described for a period long enough to be noticed by the officer on watch, the libel must be dismissed."

We must first emphasize that we are discussing the maritime law unmodified by the *Jones Act*, 46 U.S.C.A. 688. Under the Supreme Court's decision in *The Osceola*, 189 U.S. 158, it is plain that a seaman injured in the course of his employment, in addition to maintenance and cure, could recover indemnity only for unseaworthiness as that term was then understood. To learn the meaning which was given to that term by the courts at that time we must bear in mind that no seaman could recover indemnity for damages received as the result of negligence, of omission or commission, by a fellow servant and that until 1915 (The Seaman's Act) even the master and other officers having command were considered to be the fellow servants of the members of the crew. It is necessarily implicit in the *Osceola* Decision that the "absolute duty to furnish a safe

place to work" which the Appellant here attempts to sustain did not in fact exist. Otherwise the *Osceola* Decision would have gone the other way and instead of answering the certified question in the negative, the Supreme Court would have had to answer it in the affirmative because obviously the place to work was unsafe.

C. The duty to provide a safe place to work is distinguishable from the duties required of the warranty of unseaworthiness. *Mahnich* v. *Southern SS Co.*, 321 U.S. 96, 64 S.Ct. 455 (1944) involved a piece of equipment, which was defective and failed in normal use. If the rope which held the scaffold had been sound and the scaffold had fallen because of a crew member's failure to tie a proper knot in a sound rope the *Mahnich* case would have been one of negligence rather than unseaworthiness.

The *Mahnich* case and *Poignant* v. *U. S. A.*, 225 F.(2d) 595 (2 Cir. 1955) show that the owner's duties with respect to the place of work and seaworthiness are similar insofar as both are non-delegable by the employer and assumption of risk is not a defense to either. Both duties are personal and of course non-delegable for that very reason. That is different from saying that the two are the same. To say that a duty is non-delegable is not to describe the quality or the extent of the duty. If the appellant's concept of unseaworthiness in this case be accepted, then all the cases applying the negligence test under the Jones Act are incorrectly decided and the Jones Act itself was unnecessary. Since the Jones Act, however, there is no need to strain at the construction of unseaworthiness in order to give a seaman indemnity. To say that the breach of a duty to supply a safe place to work creates unseaworthiness is to destroy the very distinction recognized by the passing of the Jones Act. There is no need any longer for the Courts

to pretend that there is negligence when it does not exist, and the negligence test can honestly be applied.

In the *Poignant* case cited above Judge Hincks was aware of the difficulty in his holding, since, after holding that the result of *Cookingham* v. *U. S.*, 184 F.(2d) 213 (3 Cir., 1950) could not be justified by the mere fact that such a condition was not brought to the attention of the owner, he went on to discuss whether the condition itself created unseaworthiness and applied the test of reasonable fitness. The result is that, contrary to the appellant's contention, unless the duty to supply a safe place to work is held to be a negligence concept, distinction between the Jones Act cases and unseaworthiness cases would be obliterated.

The practical difficulties of ruling, as argued by the Appellant in the instant case, are nonexistent. There is no difficulty in deciding whether this ship or its appliances are not reasonably fit for the purposes for which they are intended by reason of the nature of their construction or arrangement, and deciding that the owner has failed in his duty to provide a reasonably safe place to work by reason of a temporary substance or temporary disarrangement of the ship and that the owner did not have notice of this temporary condition or a reasonable opportunity to correct it.

As Chief Judge Magruder pointed out in his opinion in the Court below: The Supreme Court's decisions as to ship owners' absolute obligation to furnish a seaworthy ship are all in cases where the unseaworthy condition of the ship existed at the outset of the voyage and none of them related to a temporary condition of unseaworthiness which had arisen without negligence during the progress of the voyage and the vessel was unquestionably seaworthy when it left port.

IV.
Conclusion

Certiorari should not be granted since the Court should not disturb the Opinion of the United States Court of Appeals for the First Circuit in the Court below.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 176

FRANK C. MITCHELL,
Petitioner,

v.

TRAWLER RACER, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR PETITIONER

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BRIEF FOR PETITIONER

Opinions Below

A memorandum of the District Court (D. Mass.) is reported in 167 F. Supp. 434 (R. 51-52). The opinion of the Court of Appeals for the First Circuit (R. 55-56) is reported in 265 F.(d) 426.

Jurisdiction

The judgment of the United States Court of Appeals for the First Circuit was entered on April 7, 1959 (R. 66). The petition for Writ of Certiorari was filed on July 2, 1959 and was granted on October 12, 1959 (R. 67).

The jurisdiction of this Court to review the final judgment of the United States Court of Appeals for the First Circuit is conferred by 28 U. S. Code, Sections 1254(1) and 2101(c).

Questions Presented

1. In an action by a seaman to recover damages for personal injuries sustained as a result of unseaworthiness due to the temporary presence of a foreign substance, whether notice, actual or constructive, of the unseaworthy condition is an essential element of the seaman's case.
2. In an action by a seaman to recover damages for personal injuries sustained as a result of unseaworthiness due to the temporary presence of a foreign substance, and the presence of the foreign substance arose out of the usual work performed on the vessel, whether notice, actual or constructive, of the unseaworthy condition is an essential element of the seaman's case.

Statement of the Case

This is a case involving the rights of seamen and maritime workers injured as a result of unseaworthiness, where the unseaworthiness is caused by a temporary or transitory condition arising out of the usual work of the vessel.

The petitioner's action was commenced by Complaint in the U. S. District Court on August 16, 1957. An Amended

Complaint was filed on September 19, 1958. The petitioner's Amended Complaint was in three counts, the first count based on negligence under the Jones Act, 46 U.S.C.A. 688, the second count based on unseaworthiness under the General Admiralty and Maritime Law, and the third count being for maintenance and cure. The case was tried to a jury, which returned a verdict for the respondent on Counts I and II, and a verdict for the petitioner on Count III. (R. 2)

The petitioner appealed from the jury's verdict on the unseaworthiness count and his appeal was predicated on the trial court's failure to instruct the jury correctly on what the petitioner had to prove in order to prevail in the unseaworthiness count. (R. 12, 13)

The evidence showed that the petitioner was a seaman and a fisherman, and was a member of the crew of the Boston fishing trawler Racer, and was employed by the respondent. (R. 11). On April 1, 1957, the Racer returned to Boston at the end of a ten-day fishing trip to the North Atlantic fishing grounds. (R. 15, 48). There was a trip of fish aboard to be unloaded, and the trip included fish spawn, which, during the spawning season, in accordance with agreement between crew and owner, was saved, and the proceeds shared by the twelve deck hands, in addition to their shares of the balance of the catch. (R. 16, 17, 50, 51, 54). Thus, the earnings of the captain and crew of the Trawler Racer was based upon shares of the catch of fish, shared equally, and in addition to that, the captain received a commission from the owner's share of the catch, (R. 16, 17, 54), the mate, cook and engineers received a specific amount per trip known as a "per", and the twelve deck hands received equal shares of the proceeds of the spawn. (R. 16, 17, 54). The spawn is unloaded first. Later the fish is unloaded. (R. 22). After the fish spawn is unloaded, and before the fish that remains is unloaded, the

dock and the deck are washed down by crew members using a hose. (R. 40, 41). Those crew-members who wish to go ashore then do so and the remainder, together with additional workers known as lumpers, unload the balance of the catch. (R. 15, 24).

On the morning of April 1, 1957, the petitioner had worked in the hold of the Racer in the unloading of the fish spawn. (R. 24). He then came on deck, (R. 41) went forward and into the forecastle, changed into his shore clothes and came on deck to go ashore. (R. 42). The unloading of the fish spawn had been completed. In accordance with custom, he stepped up on the port rail in order to get onto the ladder attached to the side of the wharf by which to get on shore. (R. 9, 10). The dock had been washed (R. 40, 41) and the port rail had slime and gurry on it covering about ten to twelve feet of the rail. (R. 29). As the petitioner stepped on the rail of the vessel, he slipped in the slime and fish gurry, and to save himself from falling overboard, he thrust his right arm through a rung of the ladder and hung there until able to work his way back aboard the vessel to safety. (R. 9, 10). As a result of hanging suspended by his arm, he sustained serious permanent injury to that arm.

The trial judge ruled, as a matter of law, that at the time the petitioner was injured, he was an employee of the respondent and engaged in the course of his employment. (R. 11). The trial judge denied the respondent's requests for directed verdict on the first two counts. (R. 2).

In instructing the jury, the trial judge failed to distinguish between negligence and unseaworthiness, and charged that in order to recover on either count, the petitioner had to show that the slime was on the rail for a period of time long enough for the respondent to have known about it and to have had the opportunity to remove it. (R. 11, 12).

Counsel for the petitioner made an oral request that the court distinguish between negligence and unseaworthiness, and, in particular, requested that the court instruct the jury that insofar as the unseaworthiness count was concerned, notice was not a necessary element in proving liability. (R. 13). The trial judge denied the oral request (R. 13) and the petitioner appealed to the Court of Appeals for the First Circuit (R. 13). The Court of Appeals held that the district judge had committed no error and affirmed the judgment of the district court. (R. 66).

The petitioner submits that the court below has erroneously affirmed the judgment of the district court.

Summary of Argument

Because of the nature of his employment, a seaman must serve his vessel, obey orders, be subject to discipline and work under conditions beyond his control. This form of absolute duty on the part of the seaman has its correlative duty on the part of the shipowner, that of supplying and keeping in order a seaworthy vessel.

This duty of the shipowner is absolute, non-delegable and continuing.

The numerous decisions of this Honorable Court hold that notice is not an essential element in proving a seaman's case for personal injuries arising out of unseaworthiness, whether the unseaworthy condition is temporary or not.

Argument

Out of the historical origins of the admiralty law, originating in the European Continental Codes, the mutual reliance of the seaman and his vessel upon each other, for protection and for loyal service, stands as one of the continuing and accepted doctrines which are as alive today

as they were when ancient and primitive vessels breasted their course through the waters of the Mediterranean Sea.

The seaman's prime obligation was to serve his vessel under conditions over which he had no control. The dangers of his calling, coupled with the requirements of discipline and obedience to orders, constitute an employment that stands out as being unique among workers. This obligation is as binding today as it has ever been. And as a consequence, the obligation of the shipowner to provide the seaman with a seaworthy vessel in which to perform his work has been basic to this relationship between them as employer and employee.

The doctrine of seaworthiness is based on a warranty implied by law. Breach of this warranty automatically gives rise to liability for resulting damages, unless the shipowner can establish and prove a valid defense. The warranty is one which does not depend upon negligence. And it includes the affording to seamen of a reasonably safe means of boarding and departing from the vessel.

There is a long line of cases which hold that a shipowner has an absolute and non-delegable duty to provide and maintain a seaworthy vessel, and that duty is not based upon any considerations of negligence. *The Osceola*, 189 U.S. 158, 173-175; *Carlisle Packing Co.* v. *Sandanger*, 259 U.S. 255 (1922); *Mahnich* v. *Southern S. S. Co.*, (1944) 321 U.S. 96; *Seas Shipping Co.* v. *Sieracki*, (1948) 328 U.S. 85; *Petterson* v. *Alaska S.S. Co.*, 205 F.(2d) 478 (9 Cir., 1953), affd. 347 U.S. 396, 74 S. Ct. 601 (1954).

As stated by Mr. Justice Stewart in the opinion of this Honorable Court in the case of *United New York and New Jersey Sandy Hook Pilots Association* v. *Halecki, Admx.*, 358 U.S. 613, 616-617; 1959 A.M.C. 590, 591:

> "The eventful development of the doctrine of unseaworthiness in this Court is familiar history. Al-

though of dubious ancestry,[2] the doctrine was born with The Osceola[3] and emerged full-blown 40 years later in Mahnich v. Southern S. S. Co.,[4] as an absolute and non-delegable duty which the owner of a vessel owes to the members of the crew who man her. The justification for this rigid standard was clearly stated in the Court's opinion in Mahnich:

> 'He (the seaman) is subject to the rigorous discipline of the sea and all the conditions of his service constrain him to accept, without critical examination and without protest, working conditions and appliances as commanded by his superior officers.' 321 U.S. 96, at 103."

Notice, actual or constructive, is one of the prerequisites to recovery in a negligence action, and to impose it upon cases based upon unseaworthiness would be to remove a basic distinction. However, with the emergence of the so-called "transitory unseaworthiness" doctrine in the case of *Cookingham* v. *U. S.*, 184 F.(2d) 213 (3 Cir) (1950) in which a cook was injured when he slipped on some jello on a stairway, a majority of that court held that the "transitory" presence of a foreign substance did not render the vessel unseaworthy. Judge Biggs, however, dissenting, pointed out that when one introduces evidence that the unsafe condition existed for an unreasonable period of time, it would be tantamount to constructive notice under the doctrine of negligence, i.e., fault, which is not an element in an unseaworthiness case. Judge Biggs stated:

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[2] See Gilmore and Black, the Law of Admiralty, p. 316.
[3] 189 U.S. 158, 175 (1903).
[4] 321 U.S. 96, 1944 A.M.C. 1.

> "The duty of the owner to maintain a seaworthy ship is an absolute one. It has no connection with negligence. If the ship or her gear is not safe to use, the ship is not seaworthy . . . If the stairway was in a condition dangerous for the use for which it was intended, however 'transitorily', it was unseaworthy. It remained so while the unsafe condition persisted. The element of time which has intruded itself in this case . . . is irrelevant under the doctrine of the shipowner's absolute liability."

Although the "transitory unseaworthiness" doctrine received some following, the later cases have discredited that doctrine, so that notice in such cases should no longer be anywhere felt to be a prerequisite to proving liability based on unseaworthiness.

In *Petterson* v. *Alaska S. S. Co.*, 205 F.(2d) 478 (9 Cir. 1953), affd., 347 U.S. 396, 47 S. Ct. 601 (1954), an independent stevedoring contractor brought aboard a defective block which was used in conjunction with one of the vessel's appurtenances. This resulted in injury to a longshoreman. Chief Judge Denman, speaking for the Court of Appeals, stated:

> ". . . Here we are dealing with a species of strict liability regardless of fault. It is not necessary to show, as it is in negligence cases, that the shipowner had complete control of the instrumentality causing the injury, or that the result would not have occurred unless someone were negligent. *It is only necessary to show that the condition upon which the absolute liability is determined—unseaworthiness—exists.* (cases cited) (italics supplied)

> ". . . The duty of the shipowner (to provide a seaworthy ship) . . . is a form of absolute duty owing to all within the range of its humanitarian policy . . . and . . . peculiarly and exclusively the obligation of the owner . . . one he cannot delegate . . ." (Cases cited)

The court held that the shipowner was liable, even though the injury was caused by the block brought aboard by the independent contractor. and even though control of that portion of the ship involved in the accident had been relinquished by the shipowner. And the court also stated:

> "The liability of the shipowner to the seaman for injuries resulting from unseaworthiness does not depend upon negligence. It is absolute. See Mahnich v. Southern S. S. Co., 321 U. S. at 100, where the Supreme Court said, '. . . Cases in this and other federal courts have followed the rule of The Osceola (189 U.S. 158) that the exercise of due diligence does not relieve the owner of his obligation to furnish adequate appliances.'"

In *Poignant* v. *U. S.*, 225 F.(2d) 595 (2 Cir. 1955), a stewardess slipped on a "transitory foreign substance", i.e., an apple skin, in a passageway of a vessel. The trial judge had ruled that the libellant could not recover under the Jones Act because the respondent had had no notice, actual or constructive, and the trial court also ruled that for lack of notice the respondent could not be held to have breached its warranty of seaworthiness. In reversing the decree of the district court, Circuit Judge Hincks, speaking for the Court of Appeals, stated:

> "Under the general maritime law, an injured seaman, once he proves an injury caused by an unsea-

worthy condition, may recover without proof of negligence on the part of the vessel's owner. In Seas Shipping Co. v. Sieracki . . . the Supreme Court, in referring to the doctrine of unseaworthiness stated, 'It is essentially a species of liability without fault, analogous to other well-known instances in our law. *Derived from and shaped to meet the hazards which performing the service imposes,* the liability is neither limited by conceptions of negligence nor contractual in character . . . It is a form of absolute duty owing to all within the range of its humanitarian policy.' . . . *Since the inquiry in unseaworthiness cases is not directed to the issue of the owner's fault, it follows that prior notice, actual or constructive, of the unseaworthy condition is not essential to a cause of action based on that doctrine.* (Italics supplied) That such is the law is further apparent from the decision of the Supreme Court in Petterson v. Alaska S. S. Co. In this case, the Court held that the relinquishment of control over the vessel to an independent contractor did not serve to exonerate the owner from his absolute liability . . . Since lack of control does not prevent the accrual of absolute liability for unseaworthiness, there is no reason why that liability should depend upon notice to the owner."

Continuing with the court's opinion, Judge Hincks called attention to the Cookingham and other cases which had held that a transitory foreign substance did not constitute a breach of the warranty of seaworthiness. He then stated, as follows, at pp. 597-8:

"*The Petterson case, later decided, makes it plain that the results reached in this line of cases (Cook-*

ingham) cannot be justified by the mere fact that the existence of such a condition was not brought to the knowledge of the owner or that he lacked opportunity to prevent or correct the condition . . . And so, we hold, although the owner is *absolutely liable* for failure to provide a vessel which measures up to the standard of the law, that standard is not perfection but reasonable fitness." (Italics supplied)

In a concurring opinion in the *Poignant* case, Circuit Judge Frank stated:

"A majority of the Third Circuit, in *Cookingham* v. *United States*, 184 F.(2d) 213, 215, has held that a shipowner is not liable for an unsafe condition resulting solely from the 'transitory' presence of a foreign substance. Judge Biggs, dissenting in that case, admirably stated as follows, what I believe the correct position: 'The duty of the owner to maintain a seaworthy ship is an absolute one: The Osceola, 189 U.S. 158, 173-175, 23 S.Ct. 483, 47 L.Ed. 760. It has no connection with negligence. *Seas Shipping Co.* v. *Sieracki*, 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099; *Mahnich* v. *Southern S. S. Co.*, 321 U.S. 96, 64 S.Ct. 455, 88 L.Ed. 561. If the ship or her gear is not safe for use, the ship is not seaworthy. . . . In *Mahnich* v. *Southern S. S. Co.*, supra, the Supreme Court pointed out that before the decision in The Osceola, ' * * * the right of the seaman to recover for injuries caused by unseaworthiness seems to have been rested on the negligent failure, usually of the seaman's officers or fellow seamen to supply seaworthy appliances', (321 U.S. 96, 64 S.Ct. 457), and that The Osceola made plain that the duty of the shipowner to maintain the vessel in a seaworthy condition was an absolute

one. I assume that the majority would concede that if the foreign substance, jello, had remained upon the stairway of the 'Peckham' for several days, the stairway, and hence the ship, should have been deemed to have been unseaworthy. Someone spills grease upon a rope or jello upon a stairway. The rope, an appliance, and the stairway are unseaworthy if they are thereby rendered unfit for the use for which they were intended. As was said in the *Mahnich* case, 321 U.S. at page 104, 64 S.Ct. at page 459, quoting from The Osceola, ' * * * the owners' obligation is "to supply and keep in order the proper appliances appurtenant to the ship." ' While the spilling of grease upon a rope or jello upon a stairway might be an act of negligence for which recovery might be had by an injured seaman under the Jones Act, 46 U.S.C.A. Section 688, once the dangerous situation has been created it is the absolute obligation of the shipowner to correct it. If it is not corrected and a seaman is injured because of it the shipowner must answer in damages. . . . See the *Mahnich* opinion, 321 U.S. at page 102, 64 S.Ct. at page 458, and the authorities cited therein. . . . In my view, the period during which the stairway was in an unsafe state is immaterial. . . .' "

The petitioner here takes the position of Judge Biggs in his dissent in the *Cookingham* case and the opinions of the court in the *Poignant* case.

The Court of Appeals for the First Circuit enunciated the test for unseaworthiness in the case of *Doucette* v. *Vincent*, 194 F.(2d) 834 (1 Cir. 1952), when it stated:

". . . Nor is perfection required of shipowners by the maritime law of unseaworthiness, for generally

> stated it is the shipowner's duty under the law to provide a vessel sufficient, that is reasonably adequate . . . for the trade or service in which the vessel is employed. (Cases cited) . . . It is no matter that the shipowner may have used all care and diligence to supply a vessel and equipment conforming to this standard of seaworthiness. The liability does not depend on negligence. As stated in Seas Shipping Co. v. Sieracki . . . , 'it is a form of absolute duty', that is, the shipowner must at his peril furnish a seaworthy ship and seaworthy equipment . . ."

A basic distinction here deserves recognition and restatement. While it is the duty of the shipowner to provide a seaworthy vessel, the seaworthy vessel may be described as having reasonably safe and suitable equipment and appurtenances. Thus, perfection of equipment is not expected, but only reasonably safe equipment. The duty to provide and maintain this equipment is an absolute and continuing one. Therefore, the shipowner must provide a seaworthy vessel. As to this part of the shipowner's duty, reasonable care to provide such a vessel is not enough. He must provide it. Thus, it follows that the element of notice is irrelevant. But, going further and considering the standard and condition of the vessel and equipment furnished, there is then a question of fact to be considered: whether the equipment complained of measures up sufficiently to be termed "reasonably safe and suitable." But that is a subsequent question of fact, not to be confused with the initial absolute duty to furnish a seaworthy vesssel. Restated in brief: the shipowner has an absolute duty under which he must furnish a seaworthy vessel; the test of a seaworthy vessel is "reasonably safe and suitable equipment," questions of fact.

The proper question to be considered by court or jury in these cases is not whether there was notice, but whether, in fact, there has been created an unseaworthy condition by the presence of a transitory foreign substance. "Transitory" unseaworthiness is, in effect, a type of "temporary" unseaworthiness. Is the seaman less likely to injury merely because the unseaworthy condition may be a temporary one? Is not unseaworthiness, permanent or temporary, non-transitory or transitory, just as much an unseaworthy condition, irrespective of its duration or extent? The basic question viewed in its proper light, should not entail any consideration of whether the condition complained of is transitory or non-transitory, but should be a consideration of whether the condition complained of constitutes an unseaworthy condition.

Of course, the furnishing of reasonably adequate appliances, gear and appurtenances also includes the maintaining of them in that condition, as the mere furnishing alone does not discharge a continuing duty. The warranty of seaworthiness is thus absolute, non-delegable and continuing. *Petterson* v. *Alaska S. S. Co.*, *Mahnich* v. *Southern S. S. Co.*

In *Pacific Far East Line* v. *Williams*, 234 F.(2d) 378 (9 Cir. 1956), a longshoreman was injured when he fell into the hold. Evidence showed that the injuries occurred as a result of moisture and frost on the hatch coaming and insufficient light. In its decision upholding a verdict for the injured longshoreman, the Court of Appeals for the Ninth Circuit stated that it does not follow the Cookingham doctrine of "transitory" unseaworthiness.

In *Grillea* v. *U. S. and National Shipping Authority*, 232 F.(2d) 919 (2 Cir. 1956), a longshoreman fell into the hold when the vessel became unseaworthy due to his own negligence or the negligence of his companion, or both, in selecting the wrong hatch-cover to place over the pad-eye. The court held, per Circuit Judge Learned Hand:

> ". . . It may appear strange that a longshoreman, who has the status of a seaman, should be allowed to recover because of unfitness of the ship arising from his own conduct, in whole or in part. However, there is in this nothing inconsistent with the nature of the liability because it is imposed regardless of fault; *to the prescribed extent, the owner is an insurer, though he may have no means of learning of or correcting the defect. The Supreme Court recently re-affirmed this doctrine in Alaska Shipping Co.* v. *Petterson*, 347 U.S. 396; *and we have since followed suit in Poignant* v. *United States*, 225 F.(2d) 595."

In *Rodriguez* v. *The Texas Co.*, 254 F.(2d) 295 (2 Cir., 1958), where there was oil leaking from a turbine onto a platform where a seaman was working, the court held that that raised an inference of unseaworthiness, even though it was the seaman's job to keep the platform clean.

In *Sprague* v. *The Texas Co.*, 250 F.(2d) 123, (2 Cir., 1957) where a steam connection suddenly let steam escape even though the gauge registered zero, there was a directed verdict for the injured seaman. The court held:

> "On a suit based on unseaworthiness, neither negligence nor notice of the defective condition need be considered . . . negligence or notice of defective con-

dition is not a necessary factor to sustain the trial court's decision."

In the case of *Boudoin* v. *Lykes Brothers S. S. Co.*, 348 U.S. 336, where there was an assault by one seaman upon another, and where it appeared that the shipowner had no notice, actual or constructive, of the disposition and propensities of the assaulting seaman, this Honorable Court held that the shipowner could be liable because the ship was unseaworthy "irrespective of any fault".

In the case of *Crumady* v. *Joachim Hendrik Fisser*, 358 U.S. 423, 426-427, 1959 A.M.C. 580, 583, where a longshoreman was injured on board a vessel when the topping lift broke, Mr. Justice Douglas, delivering the opinion of this Court, stated, in part,

> "We held in Seas Shipping Co. vs. Sieracki, 328 U.S. 85, 95, 1946 A. M. C. 698, 704, that stevedores, though intermediately employed, are, when performing 'the ship's service', entitled to the same protection against unseaworthiness which members of the crew doing the same work would receive. And see Pope & Talbot vs. Hawn, 346 U.S. 406, 1954 A. M. C. 1. The work of loading and unloading is historically 'the work of the ship's service.' Seas Shipping Co. vs. Sieracki, supra, 328 U.S. at 96, 1946 A. M. C. at 705.
>
> "This protection against unseaworthiness imposes a duty which the owner of the vessel cannot delegate. Seas Shipping Co. vs. Sieracki, supra, 328 U.S. at 100, 1946 A. M. C. at 708. Unseaworthiness extends not only to the vessel but to the crew, Boudoin vs. Lykes Bros. Steamship Co., 348 U.S. 336, 1955 A.M.C. 488; and to appliances that are appurtenant to the ship.

Mahnich vs. Southern S. S. Co., 321 U.S. 96, 1944 A. M. C. 1. And as to appliances the duty of the shipowner does not end with supplying them; he must keep them in order. Id., 321 U.S. at 104, 1944 A. M. C. at 7; Osceola, 189 U.S. 158, 175 (1903). The shipowner is not relieved of these responsibilities by turning control of the loading or unloading of the ship over to a stevedore company. It was held in Grillea vs. United States, 1956 A. M. C. 1009, 232 F.(2d) 919, that stevedores themselves could render a ship *pro tanto* unseaworthy and make the vessel owner liable for injuries to one of them. And see Rogers vs. United States Lines, 347 U.S. 984, 1954 A. M. C. 1088; Alaska S. S. Co. vs. Petterson, 347 U.S. 396, 1954 A. M. C. 860. We need not go so far to sustain the District Court here. For there is ample evidence to support the finding that these stevedores did no more than bring into play the unseaworthy condition of the vessel. The winch—an appurtenance of the vessel—was not inherently defective as was the rope in the Mahnich case. But it was adjusted by those acting for the vessel owner in a way that made it unsafe and dangerous for the work at hand."

Thus, just as in the *Crumady* case where the winch was not inherently defective but was made so by those acting for the vessel, so in the petitioner's case the rail of the Trawler Racer may not have been inherently defective but it was made so by the actions of crew members while unloading a portion of the catch of the vessel.

In the case of *Jenkins* v. *Roderick*, 156 F. Supp. 299, 300, 301 (D. Mass, November 5, 1957), Judge Wyzanski of the United States District Court for the District of

Massachusetts, also the trial judge in the instant case, stated,

> "When, as at bar, a seaman's injury is alleged to be due to a defective apparatus, to succeed on either the Jones Act or the unseaworthiness count plaintiff must prove (1) the defect (2) its causal connection with plaintiff's injury, and (3) the extent of plaintiff's damages. In the Jones Act count he must go further and show defendant knew or should have known of the defect."

Following the trial of this case in the district court, judgment was entered on October 2, 1958. The petitioner's Notice of Appeal was filed on October 17, 1958. On October 31, 1958 the trial judge filed a Memorandum, 167 F. Supp. 434-435 (R. 51-52), to which the petitioner wishes to make brief reference. This Memorandum had no part in the trial of the case and petitioner refers to it to show two specific inconsistencies of the trial judge.

The Memorandum suggests activities of a co-adventurer of the plaintiff. However, the trial judge ruled as a matter of law that the plaintiff was an employee of the defendant and had been injured in the course of his employment. In the Memorandum, the trial court stated that there should have been a directed verdict for the defendant on the unseaworthiness count. Nevertheless, the trial court denied the defendant's request for directed verdict.

If one were to accept the proposition that notice is a necessary element in the so-called "transitory" unseaworthiness cases, then there would necessarily arise a new problem. In each case there would be a preliminary question of fact to be determined by the court or jury, whether the condition complained of was transitory or not transitory. A shipowner-defendant could then argue that every

condition not directly connected with the physical structure of the vessel could be considered to be transitory. To do this would be to run contra to the many prior decisions of this Honorable Court in unseaworthiness cases.

It is worthy of note in the instant case that the injuries sustained by the petitioner did not occur while the unloading was going on, but after the fish spawn had been unloaded and the petitioner was on his way ashore.

This Honorable Court has said many times that the shipowner has an "absolute and non-delegable" duty to provide and maintain a seaworthy ship. It is pertinent to define what the word "absolute" means. By definition, in Webster's New International Unabridged Dictionary, 1955 Edition, (p. 8-9) "absolute" is defined as . . . "complete, free from limit, restriction or qualification . . . not relative . . .". If one relies upon this definition when this Honorable Court uses the word "absolute" in connection with the warranty of seaworthiness, there can then be no qualification, limitation or restriction, and the transitory unseaworthiness doctrine should have no acceptance or following in the courts. The shipowner still has the protection of the test of what constitutes seaworthiness, i.e., reasonably adequate and proper appliances, gear and appurtenances. To stress the "transitory" nature of a dangerous condition is to invoke concepts of negligence, which this Honorable Court rejected as unsound doctrine in the Sieracki, Petterson and Crumady cases.

Nevertheless, in the opinion of the Court, Chief Judge Magruder, speaking for the Court of Appeals for the First Circuit says:

"Cases can be found which *seem to say* that the liability thus imposed is a species of liability without fault, not dependent upon proof of negligence or other fault," and his opinion goes on to cite those cases. The petitioner respectfully submits that those cases don't merely *seem*

to say, they, in fact, say it without limitation and without restrictive suggestions (Italics supplied). These are among the foundations of the admiralty law, much of it antedating the Jones Act. These things that Judge Magruder says the cases *seem to say* are fundamental and have been accepted as basic concepts of the admiralty law. In striking at these foundations of admiralty law, Judge Magruder concluded that the cases, many by decisions of this Honorable Court did not really mean what they seemed to say.

The petitioner submits, that there are two separate and distinct avenues by which a seaman may seek indemnity for injuries sustained while employed as the member of the crew of a vessel. One is based upon negligence and there are certain elements to be proved in a negligence action; the other is based upon unseaworthiness and proof of liability differs from that in the negligence action for the same injuries. If one were to follow the reasoning and the conclusion of Judge Magruder, the result would be to obliterate the distinction between these two types of actions in many instances. Long before the enactment of the Jones Act, a seaman had the protection of the warranty of seaworthiness. The enactment of the Jones Act in 1920 merely added to the existing maritime law the shipowner's responsibility and liability for negligence and it created an additional right of recovery and did not in any way tend to limit or restrict the seaman's rights based upon unseaworthiness.

Unseaworthiness is not based upon the exercise of due care. When one speaks of unseaworthiness the exercise of due care, notice, scienter are not to be considered, since they do not enter within the concept of unseaworthiness but apply strictly to claims based upon negligence.

Judge Magruder, in his opinion, states that to hold shipowners liable for unseaworthiness created by a transitory condition would be a hard doctrine. The petitioner's

reply to that is that seamen, by the very nature of their employment, recognized by decades of learned decisions, live and work under onerous and difficult conditions over most of which they have little or no control. There is demanded of the seamen rigid requirements of discipline within the service of the vessel, and for these historic reasons the seaman's employer has had imposed upon him certain obligations which, if imposed upon a shore employer, might seem stringent and harsh, but when imposed upon the shipowner are no more harsh and no more stringent than the working conditions and the obligations imposed upon the seaman himself. The hard doctrine, if any, imposed upon the shipowner can be said to correspond to the rigorous demands made upon the seamen in the course of their employment on the shipowner's behalf.

In the opinion of the court below, reference is made to the hypothetical case of a ship which, initially seaworthy in all respects, is buffeted by a huge storm, so that part of its rail is washed away and seconds later a seaman is washed overboard through the breach in the rail. Upon being asked, petitioner's counsel stated that that would present a case of indemnity based upon unseaworthiness. The court did not pursue the matter further, but in its opinion it stated that it did not agree with counsel. The petitioner's counsel reiterates his position in the hypothetical case and suggests that a defense of the shipowner, if any exists in the hypothetical case, could be based, not upon the fact that the seaman was washed overboard seconds after the breach occurred and before the shipowner had an opportunity to replace the rail, but upon the theory that the storm was a most extraordinary one. Thus, in the hypothetical case, the shipowner could argue that the rail had been reasonably adequate for the purpose for which it had been intended, and that the seaman had been lost only because of a very extraordinary peril of the sea.

And certainly, in such a case, it would be argued by the plaintiff that the rail was not reasonably adequate. Thus the case would turn upon the test of seaworthiness or unseaworthiness of the rail, and not upon notice. That, indeed, is the proper and appropriate test in the petitioner's case.

The petitioner respectfully submits that a proper regard for reason and logic, coupled with the many decisions of this Honorable Court, should sustain his position that even where an unseaworthy condition may be of a temporary or transitory nature, notice to the shipowner is not required in establishing liability.

Conclusion

Wherefore, the petitioner respectfully submits that the ruling of the court below is contrary to logic and to the standards of law as laid down by clear pronouncements in the decisions of this Honorable Court, and that the decision of the court below should be reversed and this case should be remanded to the district court.

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Supreme Court of the United States

OCTOBER TERM, 1958

No. 176

FRANK C. MITCHELL,

Petitioner,

—v.—

TRAWLER RACER, INC.,

Respondent.

AMICUS CURIAE BRIEF IN FAVOR OF PETITIONER

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Supreme Court of the United States

OCTOBER TERM, 1958

No. 176

FRANK C. MITCHELL,

Petitioner,

—v.—

TRAWLER RACER, INC.,

Respondent.

AMICUS CURIAE BRIEF IN FAVOR OF PETITIONER

Statement of Interest of the *Amicus Curiae*

In compliance with Rule 42 of the Revised Rules of the Supreme Court of the United States adopted April 12, 1954, and on consent of all parties, the undersigned firm of Di Costanzo & Klonsky, Esqs., hereinafter set forth their argument in support of petitioner's position for a reversal of the opinion below at 265 F. 2d 426. In accordance with paragraph 5 of Rule 42, that it be sufficient to set forth the interest of the *amicus curiae,* which we assume to be separate and distinct from the interest of all attorneys to present argument in support of deserving propositions of law, we set forth the following:

1. Our firm represents almost exclusively harbor workers and seamen in the various Federal Courts, particularly those in the United States District Court for the Southern District of New York and the Eastern District of New York.

2. The remanded *Romero* v. *International Terminal Operating Co., et al.*, —— U. S. ——, 79 S. Ct. 468, decided February 24, 1959, and discussed at length in the opinion below, has been referred to our firm on behalf of Romero for further proceedings in lower courts, and the instant determination may well be dispositive of whether said further proceedings shall be before a court without or with a jury.

3. Several of the cases with which this firm has been directly concerned and are related to the arguments and opinion below, include *Grillea* v. *United States,* 232 F. 2d 919; *Palermo* v. *Luckenbach Steamship Company,* 355 U. S. 20, 78 S. Ct. 1; *Dixon* v. *United States,* 219 F. 2d 10; *Mollica* v. *Compania Sud-Americana De Vapores,* 202 F. 2d 25; and *Amador* v. *A/S J. Ludwig Mowinckels Rederi,* 224 F. 2d 437.

Questions Presented for Review and Reasons for Reversal

The opinion below favors the strange concept of merging Jones Act negligence with unseaworthiness, and by the requirement of notice, would abolish the warranty of seaworthiness. By dicta mostly, the warranty of seaworthiness is analyzed on the basis of old cases and repudiated principles of law contrary to those consistently and progressively expressed by this Honorable Court.

On the facts of this case, concerning a created danger of slime on a rail, present and not removed by reason of the ship's work in fishing and cleaning fish, even on the negligence cause there would be no need to charge constructive notice. The opinion of the Appellate Court below goes far beyond this simple issue and would find the slime to be a "transitory" condition, and thereby a special form of unseaworthiness, to require constructive notice to the shipowner.

As this is a direct assault on the well established principles of the warranty of seaworthiness where notice as well as control are immaterial, where due diligence is no defense, and the obligation is held to be continuing and nondelegable, we shall discuss the various aspects of the opinion below under the following major topics:

1. The "transitory unseaworthiness" doctrine of the 3rd Circuit in *Cookingham* v. *U. S.*, on which the opinion below relies, has been repudiated by subsequent decisional analysis, and is insupportable in its application to the instant facts.

2. Though the Court below agrees that the *Romero* v. *International Operating Co.* principle of pendent jurisdiction would allow the jury to pass on the cause for unseaworthiness, yet the jury's function is erroneously limited by affirming the refusal of a requested charge on unseaworthiness without need to prove notice.

3. The decision below erroneously repudiates the historical, decisional and statutory distinction between the Jones Act and the warranty of seaworthiness.

4. The opinion below goes beyond the question of whether a "transitory" condition can constitute unseaworthiness by making an erroneous distinction between initial unseaworthiness at the commencement of a voyage and unseaworthiness thereafter arising.

ARGUMENT

POINT I

The "transitory unseaworthiness" doctrine of the 3rd Circuit in *Cookingham* v. *U. S.*, on which the opinion below relies, has been repudiated by subsequent decisional analysis, and is insupportable in its application to the instant facts.

By reverting to the principle expressed in *Cookingham* v. *U. S.*, 184 F. 2d 213, the Court below would obscure or deny the distinction between negligence under the Jones Act (46 U. S. C. 688) and the traditional obligation of seaworthiness to thereby destroy the uniform and progressive nature of maritime tort law.

The opinion below is in direct contradiction to the multiple decisions emanating from this learned Court on the application and definition of the non-delegable and continuing warranty of seaworthiness. It is contrasted with negligence in the respect that the warranty does not require notice as an ingredient of proof. If notice be immaterial then does it matter how long the condition prompting the injury had existed? A study of the leading cases in point, even those coming from the Third Circuit where the *Cookingham* doctrine originated, emphatically rejects the concept of notice or control as essential to the warranty.

It is apparent that respondent misconceives the maritime law in the year 1959 and seeks to urge this learned Court to adopt erroneous and repudiated principles. The cases cited by it for the strange propositions of a "transitory condition", the inapplicability of the warranty of seaworthiness or the progressive maritime law herein, including the contention that petitioner assumed the risk of working in

stance nor relevance. The *Cookingham* principle has been repudiated in several circuits on persuasive reasoning. In *Poignant* v. *U. S.*, 225 F. 2d 595, Frank, *C.J.*, had written in his concurring opinion "I understand that my colleagues repudiate that thesis" (p. 603 of 225 F. 2d). The thesis referred to is that defined by the dissenting opinion in *Cookingham* by Briggs, *Ch.J.*, wherein is expressed that the *Cookingham* majority had found that because a stairway was transitorily in an unsafe state the shipowner is thereby absolved from liability (p. 216 of 184 F. 2d).

In the *Poignant* case, *supra*, a stewardess slipped on apple skin in a public passageway near the vessel's dining room and her cause was dismissed below both on Jones Act negligence and unseaworthiness. The defense was the absence of notice. Though the Second Circuit held the Trial Court was correct in dismissing the Jones Act cause, nonetheless reversal was predicated on the erroneous dismissal of the unseaworthiness cause, being distinct from any concept of negligence, on the following reasoning: "Since lack of control does not prevent the accrual of absolute liability for unseaworthiness, there is no reason why that liability should depend upon notice to the owner" (p. 597 of 225 F. 2d). The *Poignant* opinion also discusses the case of *Dixon* v. *U. S.*, 219 F. 2d 10 as to whether liability for unseaworthiness would follow if the condition, like the accident, "arose after the voyage had commenced". It was held that the rationale of the Ninth Circuit in *Petterson* v. *Alaska Steamship Co., Inc.*, 205 F. 2d 478, aff'd 347 U. S. 396, rehearing denied, 347 U. S. 994, was that the warranty applies "to unseaworthy conditions arising after the voyage began as to those earlier arising" (p. 597 of 225 F. 2d). A further pertinent portion of the *Poignant* opinion related to whether the substance on which the stewardess slipped, described as an apple peel, was transient, or the vessel was

question of fact for the trier of the facts. Of course in the instant case the triers of the facts, the jury, were not given the proper charge on unseaworthiness and its application regardless of notice or control.

Likewise, the Ninth Circuit in *Pacific Far East Lines* v. *Williams*, 234 F. 2d 378, opinion by Healy, *C.J.*, held that appellee longshoreman who slipped on moisture and frost on a hatch coaming, where there was insufficient illumination, can invoke the warranty of seaworthiness and liability was predicated thereon. With respect to the *Cookingham* "transitory" concept the Court held: "Assuming the doubtful proposition that the *Cookingham* holding is recognized in this circuit as persuasive authority, we see no analogy between it and the case before us. . . . Even though the condition of inadequate lighting be regarded as 'transitory', that fact would obviously not serve to absolve appellant of liability" (p. 379 of 234 F. 2d).

Even in the Third Circuit, subsequent to the *Cookingham* decision, it is apparent that the transitory condition principle has been honored in its breach. In *Hawn* v. *Pope & Talbot*, 198 F. 2d 800, the Third Circuit rejected its own *Cookingham* case by stating the period of absence of hatch boards over the hold could reasonably be construed as sufficient to have put appellant on constructive notice of that fact, without the record showing how long these boards were absent or that the shipowner could have known of the removal of these boards in an unused area by others than the crew members. Also in the Third Circuit's decision in *Gindville* v. *American Hawaiian Steamship Company*, 224 F. 2d 746, opinion by Goodrich, *C.J.*, the opinion obliquely notes its prior *Cookingham* decision in the following words:

> "Defendant also brings back to us our decision in *Cookingham* v. *U. S.* . . . We agree 'transitory' is an

gerous situation created by improper stowage for an ocean voyage. It is certainly quite different in fact from the momentary presence of foreign substance on the ladder in the *Cookingham* case" (p. 748 of 224 F. 2d).

The principal case in point that the opinion below rejects or ignores is that of *Petterson* v. *Alaska Steamship Company, Inc., supra,* which in turn was predicated on *Seas Shipping* v. *Sieracki,* 328 U. S. 85, 66 S. Ct. 872, and *Pope & Talbot* v. *Hawn,* 346 U. S. 406, 74 S. Ct. 202. The reasoning of Denman, *Ch.J.*, was accepted by this Court in doing away with the relinquishment of control doctrine applied by the Second and Third Circuits, by assimilating seamen to longshoremen so that the principles applicable to one on the warranty would be equally applicable to the other, and concluding that control is an issue only in the concept of negligence, entirely immaterial to the warranty of seaworthiness. The dissenting opinion in the *Petterson* case by Mr. Justice Burton, joined by Mr. Justice Frankfurter and Mr. Justice Jackson, agrees that if the equipment involved had belonged to the vessel, that the *Sieracki* and *Pope & Talbot* cases, *supra,* ". . . might justify the shipowner's liability, regardless of who was in control of the part of the ship where that equipment caused the injury" (p. 401 of 347 U. S.). Mr. Justice Frankfurter's concurring opinion in *Pope & Talbot, Inc.* v. *Hawn, supra,* concisely expresses the distinction between the warranty of seaworthiness and negligence on the background analysis that the Jones Act had given crew members a statutory cause of action for negligence separate and additional to the warranty of seaworthiness, which would not justify this Court according longshoremen a negligence remedy other than the imputed right (by doing the traditional work of seamen) to the warranty of seaworthiness. The concurring opinion goes further to state: "Since unseaworthi-

ness affords longshoremen recovery without fault and has been broadly construed by the courts, e.g., *Mahnich* v. *Southern Steamship Co.*, note 2, *infra*, it will be rare that the circumstances of an injury will constitute negligence but not unseaworthiness" (p. 418 of 346 U. S.). The dissenting opinion by Mr. Justice Jackson, with whom Mr. Justice Reid and Mr. Justice Burton joined, argues that longshoremen should not get a bonus recovery over and above the statutory scale of compensation that Congress had established for harbor workers in general, and would favor seamen on the ground of the difficult conditions of work, and that though his lot had been ameliorated,

> "even under modern conditions the seagoing laborer suffers an entirely different discipline and risk than does the harbor worker. His fate is still tied to that of the ship. His freedom is restricted. He is under an unusual discipline and is dependent for his food, medicine, care and welfare upon the supplies of the ship" (p. 424 of 346 U. S.),

and goes further to state

> "it is so important to the seaman that the ship be seaworthy . . . the seaman is not a free man" (p. 425 of 346 U. S.).

It is not meant by the latter quotation that the Court should take away from longshoremen and harbor workers their well deserved rights and remedies, but it is logical that the warranty of seaworthiness first originated for seamen and *a fortiori* should be favorably applied where a seaman is involved.

In *Palermo* v. *Luckenbach Steamship Company, supra*, this learned Court recently held that a longshoreman who chose an alternate unsafe route without adequate illumination, which had grease spots on the passageway, could

nonetheless recover on the warranty. All decisions on grease and inadequate illumination refer to them as transitory or temporary conditions. The test applied by the Second Circuit in *Mollica* v. *Compania, supra,* discussed at length in *Petterson, supra,* was whether there resulted a breach in the relinquishment of control doctrine by a period of revestment of control in the vessel during the supper hour between shifts of longshore gangs. Even this breach has been specifically repudiated in the *Petterson* decision, *supra,* as being insufficient on the issue of control. Control being absent, notice not being required, and the warranty being applicable for conditions of a temporary nature such as expressed above in *Palermo* v. *Luckenbach, Hawn* v. *Pope & Talbot, Mollica* v. *Compania, Pacific Far East Lines* v. *Williams, supra,* as well as the conditional seaworthiness concept of *Amador* v. *A/S J. Ludwig Mowinckels Rederi, supra,* all pertaining to longshoremen or harbor workers, then it must at least to the same extent apply to the petitioner herein.

POINT II

Though the Court below agrees that the *Romero* v. *International Operating Co.* principle of pendent jurisdiction would allow the jury to pass on the cause for unseaworthiness, yet the jury's function is erroneously limited by affirming the refusal of a charge on unseaworthiness without need to prove notice.

Undoubtedly there are cases where a cause for unseaworthiness would have factual elements to support a cause for negligence. See *Mollica* v. *Compania Sud-Americana De Vapores, supra.* Notice is immaterial where proof discloses the defect or insufficiency to have resulted from the course of ship's work by ship's personnel. Likewise,

where the defect be latent or obscured, and might have been discovered by proper and timely inspection, or comes within the borderline concept of an unsafe place to work, there must be overlapping of these two liability causes. It therefore follows that the Third Circuit's *Jordine* v. *Walling*, 185 F. 2d 662, which would transfer the remainder of the case to the admiralty docket after dismissing the Jones Act count, has been properly modified by this Court's recent *Romero* v. *International Terminal Operating Co. et al., supra.* Though dicta in the opinion below, and far from clear as to the meaning of pendent jurisdiction in future maritime cases, Magruder, Chief Judge, properly concludes that:

> "It would indeed be a most unseemly administration of justice if the facts found by the jury under Count I—the Jones Act claim—should in any respect be inconsistent with findings of fact made by the judge, on the admiralty side, in consideration of Count II. Simple economy of effort and efficient administration of justice prove the propriety of what the district court did here; submitting the whole case to the jury, and entering judgment on all counts in accordance with the jury's verdict" (p. 24, Appendix C to petition).

Because the cause for maintenance and cure is grounded in the same antecedents as the warranty of seaworthiness, pendent jurisdiction should also compel its determination by the same triers of the facts as would determine the Jones Act cause.

Respondent's brief in opposition to the petition herein manifests the same confusion shown in the opinion below as to the distinction between the warranty of seaworthiness and Jones Act negligence. It would deny the

warranty where the danger or defect actually results from omission or commission by the ship's personnel, on the reasoning that "To say that the breach of a duty to supply a safe place to work creates unseaworthiness is to destroy the very distinction recognized by the passing of the Jones Act" (p. 5 of brief in opposition). The jury's function was diluted by denying a charge from which the jury might pass on the question of fact as to whether the slime on which petitioner slipped was an unseaworthy condition, that is, a non-delegable and continuing obligation, irrespective of due diligence, where notice and control are immaterial.

The law is clear that whether a condition or set of conditions constitute unseaworthiness is essentially a question of fact to be resolved by the fact finding body. See: *State, Use of Johnson* v. *U.S.A.*, 165 F. 2d 911 and *Mahnich* v. *Southern S.S. Co.*, 321 U. S. 96.

POINT III

The decision below erroneously repudiates the historical, decisional and statutory distinction between the Jones Act and the warranty of seaworthiness.

In 1920 Congress enacted the Jones Act (41 Stat. 1007, 46 U. S. C. 688), to give seamen the benefits of the 1908 Federal Employers' Liability Act (35 Stat. 65, as amended, 45 U. S. C. 51-60 (1952)). By this seamen were allowed jury trials against their employers for maritime negligence, without the common law defenses of assumption of risk, fellow servant rule or contributory negligence as a complete bar, as well as an action at law for wrongful death. Section 51 of the Federal Employers' Liability Act makes every common carrier by railroad liable for "injury or death resulting in whole or in part from the negli-

gence of any of the officers, agents, or employees of such carrier, *or by reason of any defect or insufficiency . . .*" The portion we have italicized corresponds to unseaworthiness, the former to negligence. By incorporation into the Jones Act there is statutory recognition of these distinct and yet intermingled causes. See *Ferguson* v. *Moore-McCormack Lines, Inc.*, 352 U. S. 521 (1957). It is axiomatic that the Jones Act was an additional right to unseaworthiness, not alternative thereto. Maritime law in the year 1959 recognizes that a defect or insufficiency necessarily creates an unsafe place to work, to be followed by liability if causally related to injury. That such danger results from omission or commission by ship's personnel in the course of their duties must not dilute the warranty or its effect in making maritime law more civilized than the law which has often prevailed on land. To hold, as did the Court below, that an injured seaman must show notice where a defect or insufficiency arose from the act of cleaning fish or the failure to completely remove fish slime arising from the nature of the ship's work, obviously unconnected with any extraneous or intermediate fault by others than the ship's service and personnel, is to destroy the warranty and retrogressively revitalize the harsh principles of decades past.

Where the Trial Court below refused to charge on the distinction between negligence and unseaworthiness, but did charge that the seaman has a burden to prove constructive notice as to the length of time the slime was on the rail within which respondent should have had the opportunity to remove the danger, undoubtedly prompted the jury to conceive petitioner's burden to be additional to showing causal relationship under the warranty, and indeed, additional to dangers necessarily caused by ship's personnel in the course of their work and permitted to

exist for a time sufficient to prompt the accident. Notice to whom? To others than the ship's personnel, including the officers, who created and knew, or should have known, of the danger, without properly containing or failing to remove the danger? The factual situation herein is *a fortiori* to the classic case of a latent defect that could not have been discovered by the exercise of due diligence but nonetheless prompts liability by reason of the shipowner's absolute and non-delegable obligation to furnish a seaman with a reasonably safe vessel. Because the ship's liability is predicated on a danger or insufficiency that follows from ship's work, this aggravated fault should not deny a seaman's right to a charge on unseaworthiness without the confusing and unnecessary burden of proving constructive notice.

POINT IV

The opinion below goes beyond the question of whether a "transitory" condition can constitute unseaworthiness by making an erroneous distinction between initial unseaworthiness at the commencement of a voyage and unseaworthiness thereafter arising.

The decision below discusses *Dixon* v. *U. S.*, 219 F. 2d 10, opinion by Harlan, *C.J.*, to pose the question as to whether initial unseaworthiness existing at the outset of the voyage should be contrasted with a condition that thereafter arises during the progress of the voyage. Because there "is no claim that the ship's equipment was in any respect defective at the outset of the voyage" the Court below stated it does not decide "what the liabilities of the shipowner might be in respect of an initial condition of unseaworthiness" (p. 31, appendix C to petition).

We believe the question in *Dixon, supra,* should be

Second Circuit in *Poignant* v. *U. S., supra,* which held that the warranty must equally apply to conditions arising after the voyage began by reason of the *Petterson, supra,* principle that control and notice being immaterial, the owner cannot complain that at the outset of the voyage he lacked opportunity to know and correct a danger later arising.

In the instant case there is a further compelling reason to favor Judge Hincks' resolution of the question. Unlike the stewardess who slipped on an apple skin in one of the public passageways near the vessel's dining room in *Poignant, supra,* here petitioner slipped on slime that was known initially would naturally result from the produce of the voyage. Here fishing and cleaning were the known potentials for subsequent unseaworthiness, imposing on respondent from the very beginning an absolute and non-delegable duty to provide the means and personnel to contain dangers of an expectable slippery substance. This reasoning alone can explain *Boudoin* v. *Lykes Brothers S.S. Co.,* 348 U. S. 336 (1955), where the assailant's vicious propensities were latent initially and did not come to bloom until some time after the voyage commenced, or *Amador* v. *A/S J. Ludwig Mowinckels Rederi, supra,* where "conditional" seaworthiness of properly stowed cargo was dependent upon the subsequent removal of an obstructing stow of wire coils in the square of the hatch in the way of an earlier discharge of steel strips, or *Grillea* v. *U. S.,* 232 F. 2d 919, where *in rem* liability followed the disturbance of serially removed hatch boards that caused libelant to place the wrong board on the fulcrum of a pad eye the following day to topple him into a hold. Most cases arise after a voyage is commenced, certainly to longshoremen unloading a vessel or seamen cleaning fish, and to resolve the issue of seaworthiness by what

the owner might have known directly at the start of a voyage is to distort and limit this doctrine drastically. The following was pertinently stated by L. Hand, *C.J.*, in *Grillea, supra*:

> "It would be futile to try to draw any line between situations in which the defect is only an incident in a continuous operation, and those in which some intermediate step is to be taken as making the ship unseaworthy" (p. 922 of 232 F. 2d).

The opinion below applies the test of "due care" and finds support in some old cases that discuss the warranty as based on the negligence of a shipowner. It goes further to suggest that "none of them related to a temporary condition of unseaworthiness which had arisen without negligence during the progress of the voyage on a vessel unquestionably seaworthy when it left port" (p. 30, appendix C to petition). We believe this observation to be unrelated to the cases emanating from our federal Courts, since *Sieracki* v. *Seas Shipping*, 328 U. S. 85, as well unrelated to the instant facts and meaning of the warranty to be applied without regard to notice or control. "Due care" is no defense to unseaworthiness; "ordinary care" is no defense to maritime negligence. *Seas Shipping* v. *Sieracki, supra; Johnson* v. *U. S.*, 333 U. S. 46. Though the opinion below states it does not decide the question posed in *Dixon, supra*, yet it does hold that after created dangers are not unseaworthiness, for the shipowner should have a reasonable opportunity to discover the defect and remove it. This anomalous retrogression to merge negligence and unseaworthiness has the effect of destroying the latter, clearly shown in the concurring opinion by Woodbury, *C.J.*, regretting his prior "too implicit reliance on authority, that liability for unseaworthiness does not de-

pend upon a shipowner's negligence and that the owner's duty to provide a seaworthy ship is a form of absolute duty" (p. 33, appendix C to petition).

CONCLUSION

There is no need to discuss the care with which the jury function is protected by this Honorable Court. Even the Third Circuit recognizes that "transitory" is an elastic word and is one for factual determination. To remove from the jury its function of passing on the issue of fact of alleged unseaworthiness, by requiring an additional burden of constructive notice to be proven, an element alien to the warranty, is not only to dilute this ancient right made progressively clear by controlling decisions of this Court, but is also to violate the jury function. The Court below goes far beyond the facts of this case and by dicta and reliance on repudiated principles and cases long overruled or ignored, holds in effect that there no longer is a warranty of seaworthiness in favor of seamen. Clearly the decision below is erroneous and must be reversed.

Respectfully submitted,

DI COSTANZO & KLONSKY
Amicus Curiae

ROBERT KLONSKY,
PHILIP F. DI COSTANZO
On Brief

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IN THE

Supreme Court of the United States

October Term, 1959

FRANK C. MITCHELL,

Petitioner,

AGAINST

TRAWLER RACER, INC.,

Respondent.

Brief *Amicus Curiae* in Support of Reversal of Judgment of the United States Court of Appeals for the First Circuit

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I

The doctrine of unseaworthiness is one of liability without fault.

Since *The Osceola*, 189 U. S. 158, 159, 175, 23 S. Ct. 483, 47 L. Ed. 760, it has been settled law that the vessel's owner is obligated to seamen in its service to furnish a vessel which is seaworthy with respect to its appurtenant appliances and equipment (2 Norris, Law of Seamen, S. 613). A claim based on the owner's breach of this duty is not the same as one based on negligence. It is of the nature of an absolute liability, that is it does not depend upon a showing of fault or lack of care. *Seas Shipping Co. v. Sieracki*, 328 U. S. 85, 94, 100, 66 S. Ct. 872, 90 L. Ed. 1099. Thus, when seaworthiness is at issue, it matters not that the owner may have used all care and diligence in

equipping the vessel or that the owner lacked knowledge of the defective condition, *Carlisle Packing Co.* v. *Sandanger,* 259 U. S. 255, 259, 42 S. Ct. 475, 66 L. Ed. 927; *Sprague* v. *Texas Company,* 2 Cir., 250 F. 2d 123; *Balado* v. *Lykes Bros. S. S. Co.,* 2 Cir., 179 F. 2d 943; 2 Norris, op. cit., s. 619; *Mahnich* v. *Southern S. S. Co.,* 321 U. S. 96.

A good statement of the distinguishing standards is found in *Cox* v. *Esso Shipping Company,* 5 Cir., 247 F. 2d 629, 637;

> "One is an absolute duty, the other is due care. * * * The owner has an absolute duty to furnish reasonably suitable appliances. If he does not, then no amount of due care or prudence excuses him, whether he knew, or could have known of its deficiency at the outset or after use. In contrast, under the negligence concept, there is only a duty to use due care, i.e., reasonable prudence, to select and keep in order reasonably suitable appliances. Defects which would not have been known to a reasonably prudent person at the outset, or arose after use and which a reasonably prudent person ought not to have discovered would impose no liability."

Therefore, the question of notice of a defective condition, actual or constructive, is of no moment in an unseaworthiness cause of action.

The Court of Appeals, in reaching its decision in the case at bar said, however:

> "It seems a hard doctrine to say that the shipowner, however great his duty of care, should be liable for injuries occasioned thereby, even before he, through persons acting on his behalf, had a rea-

sonable opportunity to discover the defect and remove it."

This argument, insofar as it concerns an action for negligence, is valid but insofar as it concerns a condition of unseaworthiness, notice or knowledge playing no part, the question of an opportunity to discover the defect is immaterial.

A cause of action for breach of warranty of seaworthiness is analogous to a cause of action for breach of an implied warranty of fitness for use arising from the sale of personal property.

A ruling that a defendant may be answerable in damages for an injury caused without proof of negligence is not a new one to the law nor is the seaworthiness doctrine of liability without fault *sui generis*.

The Court of Appeals of the State of New York in *Blessington* v. *McCrory Stores Corp.*, 305 N. Y. 140 in holding that a cause of action based on such a warranty was independent of negligence said " * * * that, while an action for breach of a statutorily implied warranty of fitness may involve, incidentally, some showing of negligence, the contract breached is not merely one to use due care, but is a separate (implied) contract of guaranty that the goods are fit for the purpose for which they are sold and bought (*Rinaldi* v. *Mohican Co.*, 225 N. Y. 70; *Gimenez* v. *Great Atlantic & Pacific Tea Co.*, 264 N. Y. 390). Proof of negligence is unnecessary for recovery in such a suit (*Rinaldi* v. *Mohican Co., supra,* p. 75; see *Deffebock* v. *Lansburgh & Bro.*, 150 F. 2d 591, certiorari denied 326 U. S. 772)".

Historically, since 1922, when the United States Supreme Court in *Carlisle Packing Co.* v. *Sandanger*, 259 U. S. 255,

42 S. Ct. 475 held that a shipowner could be liable without any showing of negligence for unseaworthy conditions in a personal injury action, a recovery has been allowed under such circumstances. In view of the favored status of seamen and those doing work of seamen, a liberal construction of this rule is historically, not surprising. *Alaska S. S. Co.* v. *Petterson*, 347 U. S. 396; *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85.

In cases of falling booms, the breaking of guy wires and preventor wires, defects in winches, defects of hatch-covers and similar situations, it has never been upheld that in order for a plaintiff to recover for breach of warranty of seaworthiness that plaintiff must prove that the condition existed for a period of time which would give the shipowner a reasonable opportunity to discover the defect.

> *Sprague* v. *The Texas Company*, 250 F. 2d 123;
> *Mahnich* v. *Southern Steamship Co.*, 321 U. S. 96;
> *Crumsdy* v. *The Joachim Fisser*, 79 Sup. Ct. 445;
> *Grillea* v. *United States*, 232 F. 2d 319.

The courts have held that where an unseaworthy condition has been caused by one of the longshoremen, the shipowner is nevertheless responsible. *Grillea* v. *United States*, 232 F. 2d 319. The question of the duration of the condition did not play any part in the determination of this case. To introduce into the doctrine of breach of warranty of seaworthiness, the requirement that the plaintiff prove notice of a defective condition, would, in essence, eliminate the separate cause of action for the breach of warranty of seaworthiness. It is interesting to note that the same Court of Appeals decided the instant case, with the same judges sitting in *Doucette* v. *Vincent*, 194 F. 2d 834, held:

"It is no matter that the shipowner may have used all care and diligence to supply a vessel and equipment conforming to this standard of seaworthiness. The liability does not depend on negligence. As stated in *Seas Shipping Co.* v. *Sieracki*, 1946, 328 U. S. 85, 95, 66 S. Ct. 872, 877, 90 L. Ed. 1099, it is 'a form of absolute duty', that is, the shipowner must at his peril furnish a seaworthy ship and seaworthy equipment. But if the vessel and equipment, including the snatchblock here supplied, were reasonably safe and suitable, the shipowner's obligation was performed, even though there may have been some other type of snatchblock more modern or more perfect in some detail."

II

A valid distinction may not be made between unseaworthy conditions existing at the outset of the voyage and those developing subsequently.

The Court of Appeals, in its decision, attempts to distinguish between initial unseaworthiness existing at the outset of the voyage and an unseaworthy condition which arises during the progress of the voyage. The Court apparently believes that with respect to initial unseaworthiness, the obligation is absolute, whereas with respect to an unseaworthy condition which arises during the progress of the voyage, the obligation is merely to use reasonable care. In other words, the Court of Appeals equates the obligation of furnishing a seaworthy vessel after the commencement of the voyage with that of negligence.

In *Poignant* v. *U. S.*, 225 F. 2d 595, the Court of Appeals for the Second Circuit held,

> "However, as already noted, it was held in the *Petterson* case that absence of control by the owner does not exonerate him from absolute ability for unseaworthy conditions. We think that the rationale of that decision extends as well to unseaworthy conditions arising after the voyage began as to those earlier arising. We hold, therefore, that although the condition here complained of did not arise until after the voyage began and the vessel was in a foreign port, recovery was not barred on that account."

It would, therefore, seem anomalous for a seaman who, before the voyage, has the opportunity not to sign on the vessel to be entitled to receive the benefit of the warranty of seaworthiness, whereas a seaman on articles on the voyage is not so entitled.

Under the classic definition of warranty of seaworthiness, there can be no reason to make a distinction between a condition arising before the voyage and during the progress of the voyage, as it is an absolute obligation, the purpose of the doctrine being to provide indemnity by the shipowner, the party most able to provide compensation for a seaman or person doing seaman's work. Thus there is no historical or practical reason to eliminate from the protection of this doctrine an injury occurring during the voyage. *Seas Slipping Co.* v. *Sieracki*, 328 U. S. 85; *Mahnich* v. *Southern Steamship Co.*, 321 U. S. 96.

CONCLUSION

The judgment of dismissal should be vacated and a new trial ordered under a proper charge.

Respectfully submitted,

JEROME GOLENBOCK,
DONALD S. SHERWOOD.

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October Term, 1959

No. 176

FRANK C. MITCHELL, *Petitioner*,

v.

TRAWLER RACER, INC., *Respondent*

AMICUS CURIAE BRIEF

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AMICUS CURIAE BRIEF

To The Honorable, The Chief Justice and The Associate Justices of The Supreme Court of The United States:

This Honorable Court granted certiorari to Petitioner, Frank C. Mitchell, to review the judgment of the United States Court of Appeals for the First Circuit affirming the judgment of the United States District Court for the District of Massachusetts denying recovery to Petitioner on the theory that the unseaworthiness was transitory and hence Respondent was not liable for the consquences of the injuries caused or brought on by such condition.

Question Presented

IS THE FIRMLY ESTABLISHED DOCTRINE THAT A SHIPOWNER MUST MEET ITS ABSOLUTE AND NON-DELEGABLE DUTY TO SUPPLY A SEAWORTHY VESSEL AND ITS APPURTENANCES TO BE WHITTLED AWAY AND REDUCED TO A DOCTRINE WITHOUT SUBSTANCE BY THE SUBTERFUGE OF "TRANSITORY UNSEAWORTHINESS"?

Argument

Petitioner in his brief has undoubtedly fully covered the jurisdiction of the Court and the statement of the case. We will therefore limit our argument to the basic concept of the doctrine of unseaworthiness, a species of liability without fault, *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 66 S. Ct. 872 (1948) which does not depend on notice. *Mahnich v. Southern Steamship Co.*, 321 U.S. 96, 64 S. Ct. 459; *Alaska Steamship Co., Inc. v. Peterson*, 347 U.S. 396, 74 S. Ct. 601; *Pope & Talbot v. Hawn*, 346 U.S. 406, 74 S. Ct. 202; *Boudoin v. Lykes Brothers Steamship Co., Inc.*, 348 U.S. 336, 75 S. Ct. 382.

The doctrine of unseaworthiness is not a static one but changes and develops depending on the circumstances under which a maritime worker discharges his duties. Seaworthiness does not merely require that the ship and its appurtenances be reasonably fit for the purpose for which they were intended. To give the doctrine realistic meaning it must be viewed in the every day work which such workers must perform. Judge McLaughlin's discussion in *Mesle v. Kea Steamship Corporation*, 260 F. 2d 747, aptly and realistically portrays the doctrine of unseaworthiness. On page 750 he states as follows:

> "It is quite apparent that whether or not an appurtenance is 'in fit condition * * * for a voyage and the incident perils of the sea'[4] is usually an irrelevancy. It is said that '(t)he concept of seaworthiness contemplates no more than that a ship's gear shall be reasonably fit for its intended purpose.'[5] Yet examination of a great many personal injury cases in which claims of unseaworthiness were presented leads to the conclusion that those cases are of two categories, both of which fit this general definition. One is where the shipowner, having knowledge—actual or constructive—that certain activity will occur, is imposed with an absolute duty of supplying equipment for permitting the conduct and accomplishment in reasonable safety of that activity; liability is imposed for failure to comply with this duty, termed one of making the vessel seaworthy.[6] The other category is where the equipment actually supplied by the owner for doing the ship's work proves incapable of performing its function in the manner for which it was designed.[7]"

Applying these realistic principles of the doctrine of unseaworthiness to the facts in this case it readily appears that the rail of the vessel was rendered unseaworthy because of the slime and fish gurry on it. This fact situation fits the definition given by Judge McLaughlin in the *Mesle* Case. The shipowner had actual and constructive knowledge that the activity, i.e. the unloading of the fish spawn would take place and it breached the absolute duty imposed upon it of supplying equipment for permitting the conduct and accomplishment of such work in reasonable safety. The cases cited in footnote 6 of the *Mesle* Case are all authority for the proposition contended for here. The doctrine of transitory unseaworthiness has been completely repudiated by the Second Circuit in *Poignant v. U. S.*, 225 F. 2d 595. Circuit Judge Frank in his concurring opinion states as follows:

"* * * While the spilling of grease upon a rope or jello upon a stairway might be an act of negligence for which recovery might be had by an injured seaman under the Jones Act, 46 U.S.C.A., Section 688, once the dangerous situation has been created it is the absolute obligation of the shipowner to correct it. * * *

"The Third Circuit has since interpreted its Cockingham 'transitory' doctrine to mean that the ship's liability for a 'transitory' object depends upon the length of time during which the object was not removed. See Crawford v. Pope & Talbot, Inc., 3 Cir., 206 F.2d 784, 789-790. I understand that my colleagues repudiate that thesis. The Third Circuit, in a still later case, explaining the Cockingham doctrine, has said that it turns on a distinction between (a) the duty to provide a seaworthy ship, which is absolute, and (b) the duty to provide a safe place to work, which, so that court holds, demands reasonable care only. See Brabazon v. Belships Co., 3 Cir., 202 F. 2d 904, 906. I think that distinction is directly at odds with Supreme Court's decisions. I read my colleagues' opinion as repudiating it also."

In *Kurtz v. U. S.*, 121 F. Supp. 856, the Court held a vessel unseaworthy because a ladder was momentarily not lashed in place. It distinguishes *Cockingham v. U. S.*, 184 F. 2d 213, and *Adamowski v. Gulf Oil Corp.*, 93 F. Supp. 115; *Shannon v. Union Barge Line Corp.*, 194 F. 2d 584-5 and *Holliday v. Pacific Atlantic Steamship Co.*, 99 F. Supp. 173 from the *Kurtz* Case because the evidence was undisputed that if the ladder was not made fast such failure to make it fast was necessarily caused by other members of the crew. The same situation as in the case involved.

The doctrine of unseaworthiness and its transitory aspects is discussed in *Casbon v. Stockard Steamship Corp.*, 173

F.Supp. 845. Judge Wright expresses the doubt and confusion that exists by the recently injected theory of transitory unseaworthiness and notes the conflict existing by the Circuit. See *Crillea v. U. S.*, 2nd Cir., 232 F.2d 919. He expresses himself as follows:

> "Despite much weeping and gnashing of teeth by interests adversely affected, the doctrine of liability without fault remains firmly embedded in the general maritime law. The extension of this doctrine, however, to cover an increasing circle of harbor workers has been arrested, at least temporarily.[4] Moreover, there remain undecided questions concerning the application of the doctrine to transitory unseaworthiness or unseaworthiness caused by operating negligence.[5] The answer to those questions may not be provided by the "humanitarian policy" which has thus far motivated Supreme Court in extending the application of the doctrine 'to all within the range.'[6] Consequently, it is with some trepidation that a lower court proceeds in this possibly changing climate to adumbrate the correlative duties and rights of shipowner and worker in this new twilight zone.
>
> [2] It would seem certain, at least as of now, that the warranty of seaworthiness applies to those shore workers who perform duties on board the vessel traditionally performed by seamen. Pope & Talbot, Inc. v. Hawn, 346 U.S. 406, 74 S. Ct. 202, 98 L. Ed. 143; Seas Shipping Co., Inc. v. Sieracki, supra. To these workers is owed the nondelegable duty to provide a reasonably safe place to work, as well as reasonably safe appliances with which to perform the work. Mahnich v. Southern Steamship Co., 321 U.S. 96, 64 S. Ct. 455, 88 L. Ed. 561. This duty cannot be contracted away by requiring the shoreside contractor to supply the men and the equipment,[7] nor can it be avoided by abandoning part of the vessel to such contractors.[8] In fact, the

> Second Circuit has held that this nondelegable duty persists even where an unseaworthy condition is created or contributed to by the claimant himself. Grillea v. United States, 2 Cir., 232 F. 2d 919."

The doctrine of transitory unseaworthiness if permitted to take root can actually eat away and effectively destroy the humanitarian policy which is the root of the doctrine. It is difficult to imagine a situation where fertile mind of counsel would not be able to develop some fact situation to raise the dubious doctrine of transitory unseaworthiness. To uphold the doctrine of transitory unseaworthiness would destroy the absolute and nondelegable character of the duty now required of shipowners and replace it with the old common-law requirement of exercise of due care, i.e., negligence only. We submit that such a change is not only not desirable but indeed dangerous for it would deprive all maritime workers of existing established rights. The Courts have always zealously guarded the rights of such maritime workers and have guarded against commingling of the two separate duties. See *Cox v. Esso Shipping Co.*, 247 F. 2d 620, 5th Cir.

Conclusion

WHEREFORE, it is respectfully prayed that the judgment of the Circuit Court and that of the District Court be reversed.

Respectfully submitted,

MANDELL & WRIGHT

By_____

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I, ARTHUR J. MANDELL, an attorney in the offices of Messrs. Mandell & Wright, depose and say that on the 25th day of November, 1959, I served a copy of the foregoing Amicus Curiae Brief on Trawler Racer, Inc., Respondent herein by mailing the same via United States mail to Messrs. Kneeland & Splane, 50 Federal Street, Boston, Massachusetts, attorneys of record for said Trawler Racer, Inc.

ARTHUR J. MANDELL

SUBSCRIBED AND SWORN to before me, the undersigned authority, on this 25th dav of November, 1959.

Notary Public in and for
Harris County, Texas.

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TRAWLER RACER, INC.,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENT

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 176

FRANK C. MITCHELL,
PETITIONER,

v.

TRAWLER RACER, INC.,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENT

Opinions Below

A memorandum of the District Court (D. Mass.) is reported in 167 F. Supp. 434 (R. 51-52). The opinion of the Court of Appeals for the First Circuit (R. 55-56) is reported in 265 F.(2d) 426.

Jurisdiction

The judgment of the United States Court of Appeals for the First Circuit was entered on April 7, 1959 (R. 66). petition for Writ of Certiorari was filed on June 2, 1959 and was granted on October 12, 1959 (R. 67).

The jurisdiction of this Court to review the final judgment of the United States Court of Appeals for the First Circuit is conferred by 28 U.S. Code, Sections 1254(1) and 2101(c).

Questions Presented

I. In an action by a seaman to recover damages for personal injuries sustained as a result of the temporary presence of a foreign substance whether the temporary presence of that foreign substance creates unseaworthiness.

II. If the temporary presence of a foreign substance upon a vessel is held to create unseaworthiness after the commencement of the voyage, whether notice actual or constructive is a necessary element of the case.

Statement of the Case

In addition to the facts stated by the Petitioner the Respondent states the following facts: The captain, mate and owner of the vessel received no benefit from the sale of the spawn (R. 16). The captain or mate did not control the crew members in the unloading of the spawn (R. 19). The evidence as to the presence of the spawn upon the rail was conflicting. The plaintiff testified that there was spawn for approximately 10 to 12 feet along the rail (R. 31). However, the witness, Max Hauff, testified that he gave a signed statement that "the rail must have been

slippery; it was early in the morning and cold; it might have been icy," and he gave another signed statement in which he said "I do not know if there was any slime or spawn on the rail or not" (R. 44 and 45).

Summary of Argument

The transitory presence of a foreign substance upon a vessel does not create unseaworthiness. Any liability for such a condition is predicated on negligence. The cases in this Court finding unseaworthiness have all been cases involving a defective condition of the vessel or its equipment and have all been in existence at the commencement of the voyage. To hold that the transitory presence of a foreign substance is other than negligence is to obliterate the distinction between indemnity under the Jones Act and indemnity under the General Maritime Law for unseaworthiness; and, therefore, absolute liability for unseaworthiness does not extend to those cases where a transitory condition exists and where the vessel owner has not had notice actual or constructive and an opportunity to remedy the condition.

Argument

I. A shipowner is not "absolutely liable" to a crew member for indemnity for injuries caused by unseaworthiness of the ship and its equipment, unless the ship is not reasonably fit and adequate for its intended purpose.

This rule arises from the implied warranty of seaworthiness and is said to be a specie of liability without fault and irrespective of negligence.

A. The rule had its beginning with *The Osceola,* 189 U.S. 158, 23 S.Ct. 483, 47 L.Ed. 760. In that case, involving a suit for negligence, there was dictum stating that under both English and America law a right to indemnity existed in a crew member for injuries caused by unseaworthiness. The Court cited the English Act of 1876, 39 and 40 Victoria c. 80, Section 5 and the New York decision on negligence, *Scarff* v. *Metcalf,* 107 N.Y. 211.

At the time of the *Osceola* decision, the English decision in *Hedley* v. *Pickney SS Co.* (1894) A.C. 222 had been decided, wherein it was held that a ship owner had an implied obligation to use all reasonable means to insure the seaworthiness of a vessel before and during a voyage. Prior American decisions had also so held.

The Frank & Willie, 45 Fed. 494

Following the *Osceola,* came a number of decisions which turned on and developed the theory of reasonable fitness.

Thompson Towing & Wrecking Ass'n v. *McGregor,* 207 Fed. 209 (CCA 6)

In re: *Tonawanda Iron & Steel Co.,* 234 Fed, 198 (WNY)

Burton v. *Greig,* 271 Fed. 271 (CCA 5)

Adams v. *Bortz,* 279 Fed. 521 (CCA 2)

The Swiftsure, 286 Fed. 689 (E. Va.)

The Rolph, 299 Fed. 52 (CCA 9)

Then came *Carlisle Packing Co.* v. *Sandanger,* 259 U.S. 255, 42 S.Ct. 475, 66 L.Ed. 927, which cited *The Silvia,* 171 U.S. 462, 19 S.Ct. 7, 43 L.Ed. 241,

The Southwark, 191 U.S. 1, 24 S.Ct. 1, 48 L.Ed. 65, and

The Caledonia, 157 U.S. 124, 15 S.Ct. 537, 39 L.Ed. 644, all of which were cargo cases testing seaworthiness by reasonable fitness.

In *Pacific SS Co.* v. *Peterson*, 278 U.S. 130, 49 S.Ct. 75, 73 L.Ed. 220, this was said: "Unseaworthiness, as is well understood, embraces certain species of negligence; while the statute includes several additional species not embraced in that term."

Then followed a series of decisions, all of which held the duty "absolute," though none involved transitory conditions.

Mahnich v. *U. S.*, 321 U.S. 96, 64 S.Ct. 455, 88 L.Ed. 561

Seas Shipping Co. v. *Sieracki*, 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099

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United New York and New Jersey Pilots Ass'n v. *Halecki, Admx.*, 358 U.S. 613, 79 S.Ct. 517, 3 L.Ed. (2nd) 251.

See also *Tetrault, Seamen, Seaworthiness and Rights of Harbor Workers*, 39 Cornell Law Quarterly, 381.

Although Petitioner claims there is now a line of cases which seem to establish the rule that the owner is absolutely liable for unseaworthy conditions, we submit that there is a basic primary qualification, that the duty to provide a "seaworthy" vessel means the duty to provide a vessel that is "reasonably fit." That that qualification still exists is evident from the decision of *Boudoin* v. *Lykes Bros. S.S. Co.*, 348 U.S. 336, 75 S. Ct. 382, 99 L.Ed. 355.

B. Before the strict rule of "absolute liabiltiy" can be applied, it is necessary to determine whether the ship, her equipment, and complement of crew are reasonably fit, i.e. seaworthy.

Grillo v. *U. S.*, 177 Fed.(2) 904 (2 C.A.)
Tarkington v. *U. S. Lines Company*, 222 F.2d 358
Hall v. *American Oil Co.*, (D.C. M.) 160 F. Supp. 382.

Seaworthiness is a relative term and under it the ship and her equipment and complement of crew need be only reasonably fit for her intended purpose and reasonably adequate to encounter the ordinary perils of the sea.

Lahde v. *Soueta Armordora Del Norte*, 220 Fed. (2) 357 (9 C.A.), c.d. 350 U.S. 825, 76 S.Ct. 53, 100 L.Ed. 737
Reynolds v. *Royal Mail Lines, Ltd.*, 254 Fed.(2) 55 (9 C.A.)
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Hanrahan v. *Pacific Transport Co.*, 262 Fed. 951 (C.C.A. 2)

"Assault" cases point up this requirement with emphasis.

Boudoin v. *Lykes Bros. S.S. Co.*, 348 U.S. 336, 75 S.Ct. 382, 99 L.Ed. 354. "The warranty of seaworthiness is a species of liability without fault . . It merely means that 'the vessel's reasonably fit to carry the cargo.' If it is not, the owner is liable, irrespective of any fault on his part."

Jones v. *Lykes Bros. S.S. Co.*, 204 Fed.(2) 815 reh. den. 346 U.S. 857, 74 S.Ct. 72, 98 L.Ed. 404

Keen v. *Overseas Shipping Corp.*, 194 Fed.(2) 515 (2 CA) c.d. 343 U.S. 966, 72 S.Ct. 1061, 96 L.Ed. 1363:— To be reasonably fit to meet all contingencies but must be equal in disposition to ordinary men in his calling.

The ship owner is not an insurer and need not furnish an accident-proof ship.

Freitas v. *Pacific Atlantic S.S. Co.*, 218 Fed.(2d), 562 (9 C.A.)

Phipps v. *N. V. Nederl, Amerika Stoomvart*, 259 Fed. 2d 143

Larsson v. *Coastwise (Pacific Far East) Line*, 181 Fed.(2) 6, c.d. 340 U.S. 833, 71 S.Ct. 55, 95 L.Ed. 612

Manhat v. *U. S.*, 220 Fed.2nd 143:— Ship was undergoing repairs and libelant was working in lifeboat which could only descend if release lever was operated. Life boat fell and injury occurred. Libelant claimed release lever was in an unseaworthy condition and that failure to supply additional safety measures was negligence creating unseaworthiness.

Held: Release lever was properly constructed and no inference of unseaworthiness was justified. Furthermore, under no theory could a standard be considered reasonable which imposed upon the owner the duty to safeguard absolutely against the possibility that the release lever would not be moved by the other men.

The best and safest ship and equipment or complement of crew is not required.

Doucette v. *Vincent*, 194 Fed.(2) 834 (1 C.A.)
Berti v. *Compagnie De Navigation Cyprien Fabre*, 213 Fed.(2) 397 (2 C.A.)

There is no warranty that the crew will be free from incompetence or negligence toward each other, so long as they meet the test of reasonable fitness of reasonably capable men in their calling.

Larsson v. *Coastwise (Pacific Far East) Line*, 181 Fed.(2) 6 (9 C.A.), c.d. 340 U.S. 833, 71 S.Ct. 55, 95 L.Ed. 612

and their negligence shall not make the ship and her equipment unreasonably unfit.

Mahnich v. *Southern S.S. Co.*, 321 U.S. 96, 64 S.Ct. 455, 86 L.Ed. 561.
Amerocean S.S. Co. v. *Copp. Ex'r* 245 Fed.(2d) 291

In the determination of the standard of reasonable fitness, it is necessary to consider not only the purpose of the ship and voyage, but also the circumstances surrounding the occasion. Some circumstances are impossible to control, such as a certain amount of residue in fishing operations or a certain amount of oil in an engine room. It is only when accumulations of the magnitude which can be prevented occur that render the ship unreasonably unfit. When such accumulations occur, they suggest notice.

Borgensen v. *Skibs, A/S Abv.*, 156 F. Supp. 282
Mormino v. *Leon Hess, Inc.*, 119 F. Supp. 314, 210 Fed.(2d) 831 (Affirmed)

II. Transitory conditions arising on a ship reasonably fit for her purposes do not create unseaworthiness. If these conditions existed for such appreciable lengths of time that actual notice of such conditions has been received by the owner or constructive notice has developed then, of course, the condition is no longer transitory.

By definition "transitory" is temporary, transient, fleeting or impermanent. It is some condition which can be quickly and easily remedied after notice of the condition. It is a normal peril of the seas.

Gilmore & Black, The Law of Admiralty, 1957 p. 332.

It is some condition normally to be expected in the operation of the ship for the purposes for which she is intended.

Hawn v. *Pope & Talbot Inc.,* 346 U.S. 406:— Grain dust from cargo on deck. *Held:* Slippery footing to be expected therefore not unseaworthy.

Borgensen v. *Skibbs, A/S Abv.,* 156 F. Supp. 282

McDonald v. *Dingwall Shipping Co., Ltd.,* 135 F. Supp. 374

Negligence producing unseaworthiness must precede ensuing injury in point of time. Instantaneous negligence and injury have been held not to produce liability for unseaworthiness.

Manhat v. *U. S.,* 220 Fed.(2d) 143 (2 C.A.)

Penedo Cia Naviera S.S. v. *Maniatis,* 262 Fed.(2d) 284 wherein the Court queried that perhaps the pre-existance will be held to be ever so short.

Some point of time must elapse.

Titus v. *S.S. Santorini,* 258 Fed.(2d) 352

Grillea v. *U. S.,* 232 Fed.(2d) 919 (2 C.A.)

If this be so, the passage of time must be for the purpose of notice of the condition to the owner.

The case of *Poignant* v. *U. S.*, 225 Fed.(2) 595 (2 C.A.) may seem to hold that the presence of the apple peel in the passageway constituted unseaworthiness. However, careful study of the decision reveals that such is not so. The Circuit Court of Appeals remanded the case for further evidence as to whether the method of the garbarge disposal was adequate and reasonably fit. By citing the *Boudoin* case the doctrine of reasonable fitness was applied, which is of course, whether with the presence of a transitory condition, the ship is as fit as others in similar service.

As this Court has held, the decisions establish no basis of liability apart from fault other than the doctrine of seaworthiness. The duty to exercise reasonable care to furnish a safe place to work is an aspect of the shipowner's duty to refrain from negligence. The ship owner's duty is not absolute.

West v. *United States* U.S. decided December 7, 1959.

The respondent submits that if a shipowner has provided a reasonably fit ship, then should some transitory condition arise on such ship, the owner should be entitled to notice, actual or constructive, and reasonable opportunity to allow him to remedy such condition before liability attached.

III. In the decision of the Court of Appeals for the First Circuit, the Court put the hypothetical case of a vessel at sea whose rail is damaged by a huge storm and a member of the crew was injured immediately thereafter because of the absence of the rail. When asked whether this would create liability, the attorney for the petitioner answered in the affirmative, which is the only answer possible to him on his stand that liability for unseaworthiness is absolute. Certainly the rail may have been reasonably adequate for the purpose for which it was intended but at the very moment that the railing was carried away by the wave the vessel became unseaworthy. If it is held that the liability of the vessel owner is absolute, non-delegable and personal in all instances, then liability must follow in this situation.

However, Judge Magruder did not agree and stated that he must continue to believe that there is not liability in this situation. Analysis of the reasons for disagreement with such a result lies in the fact that the absence of the railing was clearly without the fault of the shipowner and the vessel owner had no opportunity to remedy the condition of unseaworthiness resulting from the huge storm. Had the railing been carried away on a prior voyage, under the doctrine of absolute liability for unseaworthiness, Judge Magruder would have found liability. Thus is made clear the remark of the Court below that "It may be in the present state of the law, as declared by controlling authority, a distinction must be made between (1) initial unseaworthiness, existing at the outset of the voyage, where perhaps we have to say that the obligation of the shipowner to furnish a seaworthy vessel is 'absolute,' and (2) an unseaworthy condition arises only during the progress of the voyage . . ."

To pass off this distinction as the attorney for the peti-

tioner did in his brief, (Page 21) by asserting that the shipowner had a defense of extraordinary peril of the sea is to beg the question. Under the hypothetical case the vessel was unseaworthy the moment the rail was gone and the vessel owner's duty to supply a seaworthy vessel, under the petitioner's argument, is absolute and there is no excuse.

If such a doctrine is repugnant then what shall we say to the doctrine that the vessel owner is absolutely liable for a temporary substance upon the vessel, placed there without his knowledge and after the voyage has begun and with no opportunity to know of or to correct the condition. It is, as Judge Magruder stated, a hard doctrine to hold shipowners liable for unseaworthiness created by a transitory condition and the reason that this doctrine appears hard is that the distinction between the negligence required of the Jones Act and unseaworthiness is thereby lost. The "safe place to work" doctrine had its origin in the Common Law not in the Maritime Law and the Jones Act was passed in 1920 in order that the vessel owner might be held liable for negligence. This was to fill that gap in the law where the vessel owner had no liability at all except for maintenance and cure for an injury occurring through negligence. The duty to provide a safe place to work is certainly distinguishable from the warranty of seaworthiness.

If the petitioner's concept of unseaworthiness be accepted in this case, then the cases applying the negligence test under the Jones Act were unnecessarily grounded upon negligence and the Jones Act itself was unnecessary, except for the cases where an admittedly competent officer gave an improper order upon an admittedly seaworthy ship. Since the passage of the Jones Act there is no need to strain at the conception of unseaworthiness in order to give a seaman indemnity. There is no need to destroy

the very distinction which necessitated the passing of the Jones Act, and the negligence test can honestly be applied.

There is no practical difficulty as contended by the petitinoer in his brief on Page 18, in that evidence as to the transitory condition, the question of notice, constructual or actual to the vessel owner and the question of opportunity to correct the condition must be introduced by the plaintiff. These requirements already exist in negligence cases and must be proved by the plaintiff. The instant case is that of a transitory condition created by co-adventurers of the plaintiff for their own profit and it is worthy of note that the accident occurred within six to eleven minutes of the time the co-adventurer of the plaintiff washed off the dock (R. 42). These matters were already in evidence on the negligence question.

The Congress provided for liability with fault for negligence under the Jones Act. This is complementary to the liability for unseaworthiness. In the instant case the jury's verdict on negligence and on unseaworthiness should not be disturbed.

Conclusion

Wherefore, the petitioner respectfully submits that the ruling of the Court below is correct and the opinion should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 176

FRANK C. MITCHELL,

Petitioner,

v.

TRAWLER RACER, INC.,

Respondent.

BRIEF OF THE AMERICAN MERCHANT MARINE INSTITUTE, INC., AS *AMICUS CURIAE*, IN SUPPORT OF RESPONDENT

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Both prior decisions of this Court and the better reasoned decisions of lower courts hold that transitory conditions do not create unseaworthiness, but that unseaworthiness is caused only by permanent conditions or conditions existing at the start of the voyage. Decisions imposing liability for negligence are not in point in view of the jury's determination in favor of respondent 3

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No. 176

FRANK C. MITCHELL,
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v.

TRAWLER RACER, INC.,
Respondent.

BRIEF OF THE AMERICAN MERCHANT MARINE INSTITUTE, INC., AS *AMICUS CURIAE*, IN SUPPORT OF RESPONDENT

Statement

Since the facts are set forth in full in the opinion of the court below, a copy of which was attached to the petition for writ of certiorari, and in the briefs of the parties, there is no need to repeat them here. Both parties to this litigation have consented to the filing of a brief by the American Merchant Marine Institute, Inc., as *amicus curiae*. The consent of the Petitioner is annexed hereto and marked Appendix A; the consent of the Respondent is annexed hereto and marked Appendix B.

The American Merchant Marine Institute, Inc. is a non-profit New York membership corporation. Its membership includes fifty-two steamship companies which operate American flag passenger, dry cargo, tanker and collier vessels having a total gross tonnage in excess of 6,500,000 tons. This represents approximately 70% of the privately-owned American flag merchant marine now operating in our foreign and domestic trades.

This case presents clearly the question whether a vessel, otherwise sound, becomes unseaworthy because of a transitory condition. The issue thus presented to your Court is of great importance to the steamship companies who make up the membership of the American Merchant Marine Institute, Inc. It has never been understood that the doctrine of seaworthiness imposed on the steamship owner or operator a liability so absolute as to include causes of action arising from a transitory condition such as the temporary presence of a foreign substance on the deck or rail.

Even though the shipowner's liability is often insured, the shipowner has a direct and vital interest in restricting to its proper limits the absolute liability arising from the doctrine of seaworthiness. All marine insurance rates are calculated directly on the basis of losses incurred. Accordingly, whether the shipowner be insured or self-insured, any holding that would broaden his liability directly increases his costs of operation.

The Institute has no connection or relationship with either of the parties to this litigation. It is interested solely, on behalf of its members, in supporting the proposition that a transitory condition is not sufficient to make a vessel unseaworthy.

Question Presented

Is a transitory condition enough to make a vessel unseaworthy?

SUMMARY OF ARGUMENT

Both prior decisions of this Court and the better reasoned decisions of lower courts hold that transitory conditions do not create unseaworthiness, but that unseaworthiness is caused only by permanent conditions or conditions existing at the start of the voyage. Decisions imposing liability for negligence are not in point in view of the jury's determination in favor of respondent.

POINT I

A ship is not unseaworthy so as to give a right of recovery to a seaman because of a transitory condition.

The brief for petitioner and the briefs filed by *amici* in support of the petitioner's position assume that a mere transitory condition, such as a foreign substance on the deck, equals unseaworthiness as that term has been defined by this Court. We believe that, properly understood, the term unseaworthiness is not an overall label which can or should be applied to every condition which can conceivably give rise to injury. Rather, unseaworthiness is a description of a definite condition, and the mere transitory presence of foreign matter on a deck or rail otherwise safe and proper does not amount to unseaworthiness.

The Courts have always been careful to distinguish between a permanent, even though latent, condition such

as a condition existing upon breaking ground or at the start of the voyage, or a condition which develops in such a way that the shipowner has notice, and a purely transitory condition. In pointing out that the correct standard is the reasonable fitness for use of the ship and equipment, this Court has indicated that unseaworthiness such as to entitle a seaman to recover would not be found from a transitory condition. Starting with *The Osceola,* 189 U. S. 158 (1903), Justice Brown after reviewing the facts and the Maritime Law back to the Rules of Oleron refused to find unseaworthiness from the negligent use of seaworthy gear. There a proper gangway was negligently raised into position by a proper derrick while the ship was out in Lake Michigan. The force of the wind pushed the gangway aft and blew down the derrick injuring libelant. While the ship was out in the lake with the gangplank up it was obviously dangerous; still this Court in answering the certified questions presented, held the vessel not liable for the negligent order to raise the gangway and the resulting temporary dangerous condition.

Thereafter, findings of unseaworthiness have been based on a continuing if latent condition such as a defective shackle (*Seas Shipping Co.* v. *Sieracki,* 328 U. S. 85 (1946)), an opening in the 'tween deck existing for such a length of time as to impute notice to the shipowner (*Pope & Talbot Inc.* v. *Hawn,* 346 U. S. 406 (1953), affirming *Hawn* v. *Pope & Talbot Inc.,* 198 F. 2d 800, 803), and a defective block (*Alaska Steamship Co.* v. *Petterson,* 347 U. S. 396 (1954), affirming 205 F. 2d 478).

In *Boudoin* v. *Lykes Bros. Steamship Co.,* 348 U. S. 336 (1955), this Court in a unanimous opinion defined the warranty of seaworthiness as applying to make a shipowner liable for engaging a person of dangerous propensities, of violent character, belligerent disposition, excessive drinking

habits, and disposed to fighting and making threats and assaults. The opinion carefully and specifically distinguished a transitory condition pointing out that the warranty of seaworthiness does not mean: (p. 339)

> "* * * that the shipowner is liable for injuries 'resulting from every sailors' brawl,' as Judge Learned Hand put it in *Jones* v. *Lykes Bros. Steamship Co.*, 204 F. 2d 815, 816. It does not mean that the owner is liable every time a seaman gets drunk and does damage to a member of the crew. It does not mean that the owner is liable for injuries from all the fisticuffs on shipboard.
>
> "'All men are to some degree irascible; every workman is apt to be angry when a fellow complains of his work to their common superior; and some will harbor their resentment and provoke a quarrel over it even after the lapse of several hours. Sailors lead a rough life and are more apt to use their fists than office employees; what will seem to sedentary and protected persons an unsufficient provocation for a personal encounter, is not the measure of the "disposition" of "the ordinary men in the calling." *Jones* v. *Lykes Bros. Steamship Co., supra*, at 817.'
>
> "The warranty of seaworthiness does not mean that the ship can weather all storms. It merely means that 'the vessel is reasonably fit to carry the cargo.' * * *"

Thus this Court stated that it would not impose liability for a transitory flare-up or other temporary condition.

In addition to the examples cited in the opinion below we call this Court's attention to the duties and liabilities of a shipowner whose vessel is in a snowstorm. Obviously he has the duty to use due care to keep the decks shoveled; he is liable for negligence, but not for the failure to catch each flake. Here respondent was found not to have been negligent in washing down the rail. Petitioner would have

respondent clean the rail after each container of spawn was passed ashore. Note that the jury below, on all the facts presented, determined the question of negligence against petitioner.

What the argument of the petitioner amounts to is an attempt to establish a third ground of liability of the shipowner, based upon the theory of "a safe place to work". Unseaworthiness and "a safe place to work" are two completely different concepts having roots in different sources. They have no similarity in origin or meaning and they require the application of different rules of law. Petitioner contends for the imposition upon a shipowner of a duty, absolute in terms, to furnish each member of the crew of his ship with a place in which to work which is absolutely safe at all times. But this is not and never has been the law.

The standard of a safe place to work is inapplicable; the correct criteria are negligence and unseaworthiness, as decided by this Court in *West* v. *United States,* —— U. S. ——, 28 USLW 4019, decided December 7, 1959.

The decision of *Adamowski* v. *Gulf Oil Corp.,* 93 F. Supp. 115 (E. D. Pa. 1950), affirmed on opinion below 197 F. 2d 523 (C. A. 3d, 1952) cert. den. 342 U. S. 906, held that a seaman falling on an oily deck could not recover on the theory of unseaworthiness where the passageway was perfectly sound, its unsafe condition being the result of temporary presence of oil on the deck. At p. 117, the lower court stated:

> "Finally, the defendant connot be held liable for unseaworthiness as is alleged in the plaintiff's complaint."
>
> "The passageway in which the plaintiff slipped was perfectly sound. Its unsafe condition was the result of the temporary presence of a foreign substance upon it, or the result of a temporary

> absence of light in it. As Judge Maris aptly said in *Cookingham* v. *United States,* supra: 'To extend the doctrine of unseaworthiness to cover such a case as this would be to make the ship owner an insurer against every fortuitous or negligent act on shipboard which results in temporarily rendering an appliance less than safe even though he may have no knowledge of or control over its happening, and without giving him a reasonable opportunity, such as is afforded by the safe place to work doctrine of the law of negligence, to correct the condition before he becomes liable for it. The ancient admiralty doctrine of unseaworthiness has never gone so far.'"

Other decisions finding no unseaworthiness from transitory conditions are:

Jello on staircase, *Cookingham* v. *United States,* 184 F. 2d 213 (C. A. 3d, 1950).

Oil on deck, *Daniels* v. *Pacific Atlantic S.S. Co.,* 120 F. Supp. 96 (D.C. E.D.N.Y. 1954); *Shannon* v. *American Barge Line,* 194 F. 2d 584 (C. A. 3d, 1952).

Water on deck, *Gladstone* v. *Matson Navigation Co.,* 1954 A.M.C. 1004 (D. Ct. of App. Cal. 1954).

Carbon disulfide in cargo, *McMahon* v. *The Panamolga,* 127 F. Supp. 659 (D.C. Md. 1955).

POINT II

The cases relied upon by the petitioner are not in point. In most of them the holdings of the courts support our position.

Without reviewing petitioner's and *amici's* other authorities in detail, the decisions from the Second Circuit involve either a failure properly to supervise stevedores, which is really based on negligence, or if a contrary interpretation be argued, they are in conflict with Judge

Hand's decision in *Jones* v. *Lykes Bros., supra,* approved by this Court in *Boudoin* v. *Lykes Bros., supra.*

In *Poignant* v. *United States,* 225 F. 2d 595 (1955), the Court of Appeals for the Second Circuit decided that a vessel is not unseaworthy simply by reason of a transitory condition. There it was claimed plaintiff was injured by slipping on an apple peel or garbage lying on the deck. The court ruled that in the absence of any other proof, this would have been insufficient to sustain the plaintiff's claim of unseaworthiness. However, there was proof that the vessel should have been equipped with a garbage chute and that the lack of this equipment (not the mere presence of the garbage on the deck) may have rendered the vessel not fit for service as similar vessels in similar service, and it was on this issue that the Court ordered a new trial. Speaking on transitory conditions, the Court said at p. 598:

> "We think the import of the Boudoin case is that just as the vessel is not unseaworthy because of the misbehavior of a seaman whose disposition and skill is the equal of that of ordinary men in the calling, so it does not become unseaworthy by reason of a temporary condition caused by a transient substance if even so the vessel was as fit for service as similar vessels in similar service."

POINT III

Assuming a transitory condition is enough to constitute unseaworthiness, here the condition arose after the vessel broke ground and hence the shipowner is liable only for the failure to use due care.

The maritime rule that a shipowner is liable without any showing of negligence for personal injuries resulting from an unseaworthy condition, is derived from cargo damage cases imposing an absolute duty on the shipowner to provide a seaworthy ship at the outset of the voyage,

as distinguished from the duty to use due care to maintain the seaworthiness of the vessel after she commences her voyage. See *The Silvia*, 171 U. S. 462, 464 (1898), and *The Southwark*, 191 U. S. 1, 8 (1903), both cargo damage cases cited in *Carlisle Packing Co.* v. *Sandanger*, 259 U. S. 255 (1922), at p. 259, and *Boudoin* v. *Lykes Bros.*, *supra*, at p. 339.

Today this duty as to shippers, has been stepped down and imposes on a shipowner no more than the obligation to use due care to provide a seaworthy vessel, regardless of whether the condition arises before or after the voyage commences. *Harter Act*, 27 Stat. 445, 46 U. S. C. §192; Carriage of Goods By Sea Act, 49 Stat. 1210, 46 U. S. C. §1304 (1); *Dixon* v. *United States*, 219 F. 2d 10 (C.A. 2d, 1955).

Despite the narrowing of the rule as applied to shippers, petitioner would have this Court expand the rule even beyond its original concepts so as to hold a shipowner absolutely liable apart from due care for unseaworthiness which develops after the voyage commences.* We submit this may not be accomplished except by uprooting established maritime principles which limit to before the voyage begins this extraordinary obligation of a shipowner to provide an absolutely seaworthy vessel.

The transitory condition here involved does not constitute unseaworthiness to begin with; but even if it did the shipowner is chargeable only with the obligation of due care, because the condition came into being after the voyage began.

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* The only case cited by petitioner to support its position is *Poignant* v. *United States*, 225 F. 2d 595 (C.A. 2d, 1955). But there the Court of Appeals for the Second Circuit did nothing more than to express its helplessness to follow the rationale of prior decisions of this Court which it presumed—we submit erroneously—had overturned the rule limiting the absolute obligation of a shipowner to provide a seaworthy vessel at the beginning of the voyage (225 F. 2d at p. 597). Moreover, since the court confirmed a finding of unseaworthiness on whether the vessel should have been equipped with a garbage chute before the voyage began, the court's statement as to liability for unseaworthiness after the vessel broke ground must be considered dictum. See 24 Geo. Wash. L. Rev. 340, 342.

CONCLUSION

The decision of the United States Court of Appeals for the First Circuit should be affirmed.

Respectfully submitted,

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APPENDIX A

MORRIS D. KATZ
ATTORNEY AT LAW
AND
PROCTOR IN ADMIRALTY

Seventy State Street
Boston 9, Mass.

December 15, 1959

Telephone
Richmond 2-3863

Walter E. Maloney, Esquire
Burns, Currie, Maloney & Rice
40 Wall Street
New York 5, New York

Re: *Frank C. Mitchell* vs. *Trawler Racer*

Dear Sir:

Please be advised that as attorney for the petitioner in the above-entitled action, I assent to an amicus curiae brief to be filed by you on behalf of the respondent.

Very truly yours,

MORRIS D. KATZ
Morris D. Katz

MDK:nm

cc/ James A. Whipple, Esquire

APPENDIX B

[LETTERHEAD OF]
KNEELAND AND SPLANE
COUNSELLORS AT LAW
Fifty Federal Street
Boston 10

For Reply Our Ref. M-6534 JAW

November 18, 1959

Burns, Currie, Maloney & Rice Esquires
40 Wall Street
New York 5, New York

Attention: Walter E. Maloney, Esquire

Dear Mr. Maloney:

Re: Frank C. Mitchell vs Trawler *Racer*
Our File: No. M-6634 JAW

Thank you for your letter of November 13, 1959. It was indeed a pleasure to be with you and also with Mr. Byrne at the dinner last week. With reference to your intervention in this case please be advised that I certainly do consent to a brief amicus curiae.

The petitioner's brief is due 45 days after October 12, 1959. The attorney for the petitioner informs me that he will take the full time for filing his brief. This means that my own brief must be filed within 30 days after that. I thought you might be interested in the time element in this matter.

If there is any way in which we can cooperate with you, please feel free to call us.

With personal regards,

JAMES A. WHIPPLE

JAW:vib.

Certificate of Service

I, WALTER E. MALONEY, Counsel for the American Merchant Marine Institute, Inc., *amicus curiae,* and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 22nd day of December, 1959, I served copies of the foregoing Brief on the following attorneys by mailing a copy to each of them in duly addressed, first-class, postage prepaid envelopes, to their respective addresses noted below, said attorneys representing all parties to the captioned proceedings:

MORRIS D. KATZ, Esq.,
Attorney for Petitioner,
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Attorney for Respondent,
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WALTER E. MALONEY

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Walter E. Maloney